

(27,468)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 713.

HIRAM CHASE, JR., A MINOR, BY HIS NEXT FRIEND,
HIRAM CHASE, APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1919, of said Court, before the Honorable John E. Carland and the Honorable Kimbrough Stone, Circuit Judges, and the Honorable James D. Elliott, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to-wit: on the thirtieth day of September, A. D. 1918, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Nebraska, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Hiram Chase, Jr., minor, by his next friend, Hiram Chase, was Appellant, and the United States of America was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following.
to-wit:

Be it remembered, that on the 19th day of May, 1910, Bill of Complaint was filed in the office of the Clerk of this Court, which said Bill of Complaint is in words and figures following,
to-wit:

(Bill of Complaint.)

In the Circuit Court of the United States in and for the District of Nebraska, Omaha Division.

No. 11 Z.

HIRAM CHASE, a Minor, by His Next Friend, HIRAM CHASE,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant.

To the Judges of said Court:

Your petitioner, Hiram Chase, who is a minor of the age of 15 years by his next friend and father brings this his petition against the defendant the United States of America under the provisions of the Act of Congress of February 6th, 1901, contained in the thirty-first Statutes at Large at page 760.

Whereupon your petitioner complains of the defendant for at the times of the grievances hereinafter set forth the petitioner was and now is a member of the Omaha tribe of Indians, and is entitled to all the rights conferred on members of said tribe under the various statutes of the United States, more specifically mentioned herein after.

Your petitioner further says that by virtue of the 8th section of an act of Congress of August 7th, 1882, set forth in the twenty-second Statutes at Large page 341, and the amendatory act thereof of March 3rd, 1893, contained in the twenty-seventh Statute at Large page 612, the residue of tribal lands of the said Omaha tribe of Indians situate on the Omaha Indian Reservation, in what is Thurston County, in the State of Nebraska, was and is by said Statute reserved for the special and only purpose of being allotted in severalty in quantities of 80 acres each to children to be born of said tribe, subsequent to the general allotment of lands in severalty to the members of said tribe, completed and approved by the Secretary of the Interior during the year 1884.

2 Your petitioner further says that he was born a member of said tribe on or about the 3rd day of December, 1895, and that petitioner's father, according to the provisions of said act of Congress of August 7, 1882, selected the following tract of the residue of said tribal lands, for the purpose of an allotment under the provisions of said statutes, for the petitioner, as follows, to-wit:

The West Half of the North West Quarter of Section 25, Town 25, Range Nine East of the 6 P. M. in the State of Nebraska.

Your petitioner further says that afterwards the petitioner's father made proper application on behalf of the petitioner to the Secretary of the Interior, on or about the 11th day of December, 1909, for the purpose of his approval and confirmation of said allotment unto your petitioner, but that the said Secretary of the Interior refused so to do and still refuses so to do, and that your petitioner has no remedy in the premises to obtain his said allotment of land except by judgment and decree of this Court for which he prays and for costs.

HIRAM CHASE, JR.,

By His Next Friend, HIRAM CHASE, SR.

THE STATE OF NEBRASKA,

Thurston County, ss:

I, Hiram Chase, being first duly sworn depose and say that I am the father and next friend of the above named Hiram Chase a minor of the age of 14 years, and acting as his next friend in the above entitled cause I have read the foregoing petition and that the facts therein stated are true as I verily believe.

HIRAM CHASE.

Subscribed in my presence and sworn to before me this 19th day of May, 1910.

[SEAL.]

GEO. H. THUMMEL,

Clerk,

By JOHN NICHOLSON,

Deputy.

Filed May 19, 1910, Geo. H. Thummel, Clerk.

(Demurrer to Bill of Complaint.)

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's petition to be true, in such manner and form as the same are therein set forth and alleged, demurs to the said petition and for cause of demurrer shows:

1st. That it appears by the plaintiff's own showing by the said petition that he is not entitled to the relief prayed by the petition against this defendant.

2nd. That said petition is without equity.

Wherefore, and for divers other good causes of demurrer appearing on the said petition, this defendant demurs thereto and prays the judgment of this Honorable Court whether it shall be compelled to make any answer to the said petition; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

F. S. HOWELL,

United States Attorney;

A. W. LANE,

Assistant United States Attorney,

Attorneys for Defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

A. W. LANE,

Of Counsel for Defendant.

STATE OF NEBRASKA,

County of Lancaster, ss:

A. W. Lane, being first duly sworn according to law, deposes and says that he is the Assistant United States Attorney for the District of Nebraska, and one of the attorneys for the defendant in the above case, and that the foregoing demurrer is not interposed for delay.

A. W. LANE.

Subscribed in my presence and sworn to before me this 7th day of September, 1910.

[SEAL.]

HELEN HANDSAKER,

Notary Public.

Filed Sept. 8, 1910. Geo. H. Thummel, Clerk.

Case No. 13 "Z."

NELLIE HALLOWELL, a Minor, by Her Next Friend, SIMMON HALL-
WELL, Plaintiff,

VS.

THE UNITED STATES OF AMERICA, Defendant.

Case No. 11 "Z."

HIRAM CHASE, a Minor, by His Next Friend, HIRAM CHASE,
Plaintiff,

VS.

THE UNITED STATES OF AMERICA, Defendant.

THOMAS C. MUDGE, D. J.:

These two cases involve the same question. An act of Congress approved August 7, 1882, (32 stat. 341) contained the following provision:

"Sec. 8. That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty five years in trust for the sole use and benefit of the said Omaha Tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever; Provided, that from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions and limitations as are provided in section six of this act, touching patents to allottees therein mentioned. But such conditions, restrictions and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common. And provided further, that these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe: Provided, That said Indians or any part of them may, if they shall so elect, select the land which shall

be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act."

An act of Congress approved March 3, 1893, (27 stat. 630) contained the following:

"That the act of Congress approved August seventh, eighteen hundred and eighty-two entitled "An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes "be, and the same is hereby amended so as to authorize the Secretary of the Interior, with the consent of the Indians of that tribe, to allot in severalty, through an allotting agent of the Interior Department, to each Indian woman and child of said tribe born since allotments of land were made in severalty to the members thereof under the provisions of said act, and now living, one-eighth of a section of the residue lands held by that tribe in common instead of one-sixteenth of a section, as therein provided, and to allot in severalty to each allottee under said act, now living, who received only one-sixteenth of a section thereunder, an additional one-sixteenth of a section of such residue lands: Provided that the allotments so made shall be subject to the same conditions, restrictions, and limitations provided for in sections six, seven, and eight of said act, touching allotments and patents to allottees therein mentioned; And, provided, That the expenses incurred in making the allotments hereby authorized shall be defrayed out of the funds appropriated for surveying and [allotting] Indian reservations."

The complainants are minor Indian children, members of the Omaha tribe, each born since the passage and approval of the latter act of Congress. Each of them claims the right to an allotment of eighty acres of land from the residue of the tribal lands, by reason of an application made to the Secretary of the Interior in 1909, and by him refused.

The main question presented by the demurrer is whether such children are entitled to allotments.

It is agreed by counsel that allotments were made under the first act mentioned, but that a patent was never issued to the tribe for the remaining unallotted land; that under the latter act of Congress allotments were made, and that there remains a small amount of land about forty five hundred acres in all, which has not been allotted. It is contended for the complainants that this is subject to allotment to any child of the Omaha tribe, in the order of application, until such land is all allotted. On the basis of allotment claimed by complainants, of eighty acres to each child, about fifty-six allotments could be made. It appears from an official communication to Congress made by the Secretary of the Interior by direction of the President, (H. Doc. 1431, 60th Congress 2d Session), that five hundred twenty children of the Omaha tribe were living in 1909 who had been born since the approval of the act of March 3, 1893, and that no allotments had been made under the latter act, out of the residue of unallotted lands, to the children born to the members of the tribe after the allotments under the act of

1882. I think that Congress intended by the act of 1893, to remedy the situation which had arisen by the failure to carry out the act of 1882, and by that amendatory act took away the inchoate right of the Indian children, born since the act of 1882, to allotments under that act, and in place of that provision gave to each Indian woman, and to each Indian child born since the passage of the former act, and living at the passage of the latter act, the right to an allotment amounting to eighty acres of land. This is the construction the Department of the Interior has placed upon the act, and it has made allotments, and patents have issued accordingly. Such construction acquiesced in for so long a time is entitled to great weight. It must be assumed that Congress knew of the limited amount of land remaining unallotted, and of the number of women and children who would take allotments under the act of 1893, and of the further fact that there would remain but a small portion of the unallotted land. If Congress intended that this should be allotted to children in the order of their birth, or in the order of application for them, until the land was all taken, it would seem that such intention would have been expressed. I am of the opinion that the act of 1893 repealed the provisions of the act of 1882 so far as the act of 1882 gave the right of allotments to children born after the approval of that act, and provided for a new allotment to be made by the Secretary of the Interior to all living children born since the allotments were made under the act of 1882, and to the Indian women, and thereby withdrew the unallotted lands from the provision of the act of 1882 and that the disposal of the residue, after carrying out of the act of 1893, is subject to the further action of Congress.

The demurrers will therefore be sustained.

Filed Oct. 2, 1911, Geo. H. Thummel, Clerk.

7 *(Order Sustaining Demurrer to Bill of Complaint.)*

Case No. 11, Doc. "Z."

HIRAM CHASE, a Minor, by His Next Friend, HIRAM CHASE,
Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

The defendant's demurrer to the complainant's bill herein having heretofore been submitted, and the Court being duly advised in the premises, it is

Ordered, That said demurrer be sustained; to which the complainant excepts. Clerk enter this order.

THOS. C. MUNGER,
Judge.

Filed Oct. 2, 1911, Geo. H. Thummel, Clerk.

Amended Bill of Complaint.

No. 11, Doc. Z.

HIRAM CHASE, a Minor, by His Next Friend, HIRAM CHASE, SR.,
Complainant,

vs.

UNITED STATES OF AMERICA, Defendant.

To the Honorable the Judges of the District Court of the United
States for the District of Nebraska:

Hiram Chase, a minor by his next friend, Hiram Chase, Sr., Complainant, brings this his amended bill of complaint against the United States of America, defendant, and complaining avers that he is a member of what, until recently, was known as the Omaha Tribe of Indians of Nebraska, being the tribe of Indians designated as the Omahas in the various statutes of the United States, and in the treaties hereinafter referred to; and that the cause of action in this bill of complaint set forth is one arising under treaties heretofore made between the Omaha Tribe of Indians and the United States, and under laws of the United States relating to the Omaha Indian Reservation and the allotments of lands thereunder to the members of the Omaha Tribe of Indians, including this complainant, and that the value of the sum in controversy herein exceeds the sum and value of \$3,000, exclusive of interest and cost. Complainant further avers that he has been recognized by the said tribe and the members thereof as a member of the said tribe, and entitled to all the rights and privileges of a member of the said Omaha Tribe of Indians.

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II.

Complainant further complaining avers that, on the 16th day of March, 1854, a certain treaty was entered into by and between the Omaha tribe of Indians and the United States of America, wherein and whereby the Omaha tribe of Indians ceded to the United States certain lands in lieu whereof they received their present reservation, including the lands hereinafter more particularly described, which treaty more fully appears in the United States Statutes at Large, Volume 10, page 1043, to which for greater certainty your complainant refers.

III.

Your complainant further avers that on the 6th day of March, 1865, another treaty was entered into between the Omaha tribe of Indians and the United States of America, which contained a provision in Article IV to the import and effect that the lands not ceded to the United States but reserved for the Omaha tribe of Indians should constitute and be known as the "Omaha Reservation," and

that the said lands composing the said "Omaha Reservation" should be subject to assignment in limited quantities in severalty to the members of the Omaha tribe of Indians, meaning and intending thereby that the title (ownership) to the said lands should vest in the Omaha tribe of Indians subject to allotment to the individual members of the tribe as therein provided for, and therein and thereby vested in the Omaha tribe of Indians and their individual members thereof, a title to the said lands as distinct from a mere right of occupancy, and that the vesting of said title in said lands in the Omaha tribe of Indians and the individual members thereof was based upon the valuable consideration between the said Omaha tribe of Indians and the United States of America, to-wit: by the session of said tribe to the United States of certain lands as in said treaty provided, and by reason whereof the United States and the Congress of the United States were divested of authority to pass any act which would legally deprive the Omaha tribe of Indians and the individual members thereof, including complainant herein, of their legal right in and to said land, or the legal right of your complainant herein to claim, assert, and have an allotment in the lands denominated in said treaty as the "Omaha Reservation." The said treaty of 1865 more fully appears in the United States Statutes at Large, Volume 14, page 667, and to which for greater certainty your complainant refers.

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IV.

Your complainant further avers that the Congress of the United States passed an act, approved August 7, 1882, which provides upon the consent of the Omaha Tribe of Indians for a sale of a portion of the Omaha Indian Reservation lying west of the right of way granted by the Omaha Tribe of Indians to the Sioux City & Nebraska Railroad Company, under an agreement dated April 19, 1880, and approved by the Secretary of the Interior, July 27, 1880. That by Section 5 of said act it was further provided that the "Secretary of the Interior be authorized to allot the lands of the Omaha Reservation, and lying east of the said right of way in severalty to the Indians of said tribe in quantity, as follows: To each head of a family one-quarter of a section; to each single person over eighteen years of age one-eighth of a section; to each orphan child under eighteen years of age one-eighth of a section; and to each other person under eighteen years of age one-sixteenth of a section; which said allotments to be in lieu of allotments or assignments provided for in the fourth article of the treaty of 1865."

V.

Section 6 of said act of 1882 further provided that the Secretary of the Interior "shall cause patents to issue therefor in the name of the allottees, which patents shall be of legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, etc."

VI.

That by Section 7 of said act it was further provided, "that upon the completion of said allotments and the patenting of the lands to said allottees each and every member of said tribe of Indians shall have the benefit of, and be subject to the laws of the State of Nebraska, and said state shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law."

VII.

That by Section 8 of said act of 1882 it is further provided: "That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever: Provided, that from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in Section 6 of this act, touching patents to allottees therein mentioned. But such conditions, restrictions and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: And, provided further, that these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe: Provided, that said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act."

That said act of 1882 is set forth in the United States Statutes at Large, Volume 22, page 341, to which for greater certainty your complainant refers.

VIII.

Your complainant further avers that said act of 1882 as provided in Section 1 thereof, was to become effective upon the consent thereto by the Omaha tribe of Indians expressed in open council, and which said consent from the Omaha tribe of Indians was given on the 5th day of May, 1883, and appears in the records of the Commissioner of Indian affairs as follows, to-wit:

United States Indian Service.

Omaha, Nebraska, Agency, May 5th, 1883.

I certify on honor that on this 5th day of May, 1883, the Omaha tribe of Indians being assembled in open council, the act of Congress, entitled: "An Act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the state of Nebraska, and for other purposes," approved August 7th, 1882, was read and fully explained to them by the Official Interpreter, and that they did then and there consent to and approve the provisions of the said act of Congress.

GEO. N. WILKINSON,
U. S. Indian Agent.

Witness:

WILLIAM C. McBEATH,
Clerk.

Interpreter's Certificate.

I certify on honor that the act of Congress entitled, "An Act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes," approved August 7th, 1882, was this day read to the Omaha tribe of Indians in open council assembled, and by me correctly interpreted to them, and that they clearly understood the matter, and conditions thereof before consenting thereto.

JOHN PILCHER,
Interpreter for Omaha.

Omaha Agency, Nebr.: May 5th, 1883.

Witness:

WILLIAM C. McBEATH,
Clerk.

United States Indian Service.

Omaha and Winnebago Agency, Nebr.,

May 7th, 1883.

To the Hon. Commissioner of Indian Affairs,
Washington, D. C.

SIR:

I have the honor to transmit herewith the papers in the matter of the approval of the bill for the sale of the Omaha lands after two days of tedious council and expensive feasting; they approved the bill with this proviso, that I write to the Great Father and ask that he appoint as appraisers friends of the Agent who will listen to him and appraise the lands high so they can get a good price for them. They were quite earnest and emphatic on this point and consider their approval contingent upon the Great Father's attention to their

ishes in this matter. I have the honor to state that there will be a great rush for these lands, and in some cases many applicants for the same piece, and that the decision in such case be not contingent upon the fleetest horses or the greatest amount of muscle of the applicant in the scramble for priority, and at the same time to benefit my Indians, I would like that the Honorable Secretary of the Interior,—if consistent with the provisions of the bill—prescribe such regulations as will give the Indians the benefit of competition in the sale.

Very respectfully, your obedient servant,

GEO. N. WILKINSON,
U. S. Indian Agent."

IX.

Your complainant further avers that pursuant to the said Section 8 of said act of 1882, certain of said lands were allotted to the different members of the Omaha tribe of Indians, and which said allotments were approved by the United States acting through its proper officers in July, 1884, and that patents from the United States were issued to the said allottees for the lands so allotted under date of December 28, 1884.

X.

Your complainant further avers that for some reason to your complainant unknown the proper officers of the United States charged with the duty under Section 8 of the Act of 1882 to issue a patent to the Omaha tribe of Indians for the lands, and in the manner and form as in Section 8 of the Act of 1882, provided, failed and neglected to execute, issue and deliver said patent, but your complainant upon advice of counsel avers that the issuance of said patent by the proper officers of the United States was but a ministerial duty and that in law and equity the title to said lands became and was vested in the Omaha tribe of Indians as fully and effectively as if said patent has been issued as in said Section 8 provided.

XI.

That in said Section 8 it was provided: "That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, to-wit: within twenty-five years from and after the approval of the allotments which have been made under said Act of 1882, to-wit: twenty-five years from and after July 10, which would be July 10, 1909.

XII.

That under date of February 8, 1909, the Secretary of the Interior made a report to the House of Representatives relating to allotments

of land under Section 8 of the Act of 1882, and relating to the said patent therein provided for, in which among other things the said Secretary reported:

"Allotments on the Omaha Indian Reservation were originally made in accordance with the provisions of the Act of August 7 1882 (22 Stat. L., 341). Allotments under this Act to 954 members of the tribe were approved by the department on July 11, 1884, and the trust period for such allotments will expire on July 10, 1909. * * * For reasons which the present administration of the department and of the Indian office is unable to supply, no patent to the tribal lands was issued in accordance with the direction of Section 8. * * * Section 8 of the Act of August 7, 1882, *supra*, provided that from the residue of lands to be patented to the tribe in common, allotments should be made and patented to each Omaha child born prior to the expiration of the time during which it was provided that the tribal lands should be held in trust (i. e., prior to July 10, 1909, on the constructive hypothesis herein outlined), the individual patents to override the patent to the tribe in common, and the lands so patented to the children to be segregated from the tribal lands. It is worthy of note also that the trust period on the proposed allotments to children was to expire, under the terms of this section, simultaneously with the expiration of the trust period on the tribal lands. No allotments to children have been made under this section. The only allotments made from the residue of lands after the allotments of 1884 were made under the terms of the Act of March 3, 1893 (27 Stat. L., 612, 630), which was amendatory in that it gave larger areas to children allotted under the former act, and provided for allotments to all women and children in being on March 3, 1893. The latter act, however, did not repeal the former, so that there can be no doubt but that the children born since March 3, 1893, have been born into a right to an allotment of 40 acres each under the provision of the Act of August 7, 1882, *supra*, so long as any is left of the tribal land."

XIII.

Your complainant upon advice of counsel avers that the said Act of March 3, 1893, hereinafter referred to, did not repeal the
 14 Act of August 7, 1882, and that under and by virtue of Section 8 of the Act of 1882, each and every child born into the Omaha tribe of Indians after the date of August 7, 1882, including your complainant, became, was and is entitled to make, have and receive an allotment of the lands in the Omaha Reservation, as provided for in said Section 8 of the Act of 1882.

XIV.

Complainants further avers that the Congress of the United States under date of March 3, 1893, passed an act, in which among other things, it is provided: (27 Stat., 630.)

"That the act of Congress approved August 7, 1882, entitled 'An Act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes,' &c., and the same is hereby, amended so as to authorize the Secretary of the Interior, with the consent of the Indians of that tribe, to allot in severalty, through an allotment agent of the Interior Department, to each Indian woman and child of said tribe born since allotments of land were made in severalty to the members thereof under the provisions of said act, and now living, one-eighth of a section of the residue lands held by that tribe in common, instead of one sixteenth of a section, as therein provided, and to allot in severalty to each allottee under said act, now living, who received only one-sixteenth of a section thereunder, an additional one-sixteenth of a section of such residue lands: Provided that the allotments so made shall be subject to the same conditions, restrictions, and limitations provided for in Sections 6, 7 and 8 of said act, touching allotments and patents to allottees therein mentioned: And, Provided, That the expenses incurred in making the allotments hereby authorized shall be defrayed out of the funds appropriated for surveying and allotting Indian reservations."

XV.

Your complainant further avers that the purpose and intent of the said amendment of the Act of 1882 by the said Act of March 3, 1893, was to increase the amount of allotments to Indian women and children from one-sixteenth of a section to one-eighth of a section, and to all other persons who had received under the Act of 1882 an allotment of one-sixteenth of a section and living at the time of the Act of 1893, an additional allotment of one-sixteenth of a section, so as to increase the allotment to one-eighth of a section. That it was not the purpose and intent of said Act of 1893 to deprive any member of the Omaha tribe or his or her right to an allotment of lands out of the Omaha Reservation; and complainant avers upon advice of counsel that all members of the Omaha tribe of Indians, including complainant, were and are entitled to allotments under the Act of 1882, as therein provided, subject only to the provision as amended in the Act of 1893, to-wit: that if the allotment under the Act of 1882 was limited to one-sixteenth of a section that said allotment should be increased to one-eighth of a section; and further avers upon the advice of counsel that it was not within the power of Congress by the Act of 1893, or otherwise, to take from, or deprive any member of the Omaha tribe of Indians, including this complainant, of the right to an allotment of lands in the Omaha reservation.

XVI.

Your complainant was born on or about the 3rd day of December 1895, of parents, who at said time were members of the Omaha tribe of Indians, and your complainant ever since has been a member of

said Omaha tribe of Indians, and has been and is entitled to an allotment of lands out of the lands known as the Omaha Reservation, and has caused to be, and has selected for complainant's said allotment the following described lands:

The West Half of the North-west quarter of Section 25, Township 25, Range 9, East of the 6th P. M. in the State of Nebraska,

being a part of the Omaha Reservation, and has caused to be made, and has made an application to the Department of the Interior to have said allotment to this complainant approved. That, notwithstanding the fact that this complainant is entitled to have said allotment of lands so made approved, and the same patented to complainant, as provided by law in that behalf, under the treaties and acts of Congress hereinbefore referred to, the defendant by and through its Interior Department has wrongfully neglected and failed to recognize or approve the said allotment, and has wrongfully failed, neglected and refused to issue or deliver unto this complainant a patent for the said land, although duly requested so to do, but this complainant for want of information in that behalf is unable to aver what particular reasons if any the Interior Department may have for wrongfully neglecting and refusing to approve the said allotment, and for wrongfully neglecting and refusing to issue a patent to this complainant for the said lands so selected.

XVII.

Your complainant further shows to your Honors that by an Act of Congress, approved February 6, 1901, (13 U. S. Stat. 760) it is provided, that all persons who are in whole or in part of Indian blood or descent, who are entitled to allotment of land under any act of Congress, or who claim to be so entitled under any allotment act or any grant made by Congress, may commence, prosecute or defend an action, suit or proceeding in relation to their rights thereto in a proper court of the United States, and that the said Act of Congress gives this court jurisdiction to take cognizance of any action, suit or proceeding arising within their respective jurisdiction involving the right of any person in whole or in part of Indian blood or descent, to any allotment of land under any treaty or law of the United States; and said act further provides that a judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect when properly certified to the Secretary of the Interior as if such allotment had been allowed and approved by him; which said Act of Congress was published by authority of the United States in the 28th vol. of the Statutes at Large on page 305, and which said act has been amended by reenactment duly approved by the President of the United States, February 6, 1901, to which for greater certainty your complainant refers.

Wherefore, your complainant shows to your Honors, that your complainant is without a remedy at law, and is remediless, unless

deceived by your Honors sitting as court of equity, and therefore prays the aid of this Honorable Court in the premises, and that said defendants, the United States of America, may be required to answer your complainant's bill, but answer under oath being expressly waived, and that upon a final hearing in this case it may be adjudged and decreed that the complainant is entitled to have the lands heretofore described by the complainant selected for an allotment out of the lands of the Omaha Reservation to be in all things approved and confirmed, and that a certified copy of the decree approving and confirming the said allotment of lands to the complainant may be duly certified to the Secretary of the Interior.

May it please your Honors to grant unto your complainant a writ of subpoena to be issued under the seal of this court directed to the United States of America, defendant therein and thereby commanding the defendant on a day certain, and under a certain penalty therein to be limited to be and appear before this court, and then and there to answer all and singular the premises, and to stand to and abide and perform such order and decree therein as the court shall enter.

JOHN LEE WEBSTER,

Solicitor for Complainant.

STATE OF NEBRASKA,

County of Thurston, ss:

Hiram Chase, being first duly sworn, deposes and says that he is the father of complainant therein, and that the facts stated in the foregoing petition are true and except as to such matters as are stated upon information and belief or advice of counsel, and as to such matters the complainant believes the same to be true.

HIRAM CHASE.

Subscribed in my presence and sworn to before me this 27th day of Sept. 1912.

H. D. HANCOCK,

Notary Public.

[SEAL.]

Endorsed: Filed in the District Court on Sept. 28, 1912.

(Answer to Amended Bill of Complaint.)

The United States of America by T. S. Allen, U. S. Attorney for the District of Nebraska, and Howard Saxton, Assistant U. S. Attorney for said District, for answer to the amended bill of complaint filed herein, by the plaintiff, alleges:

First.

It admits paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 11, 12 and 14, of the amended bill of complaint filed herein.

Second.

It admits the first three lines and the first three words of the fourth line ending with the word "America" of the third paragraph of said bill of complaint, but denies each and every other allegation of said paragraph three.

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Third.

It denies each and every allegation contained in paragraphs 13 and 15 of said amended bill of complaint.

Fourth.

It admits all of paragraph 17 of said amended bill of complaint except the prayer thereof, which commences with the word "wherefore" being the first word in the first subdivision of the said paragraph 17, on page 14 of said amended bill of complaint, all of which prayer beginning with said word to the end of said paragraph 17, defendant denies each and every allegation thereof.

Fifth.

For answer to paragraph 10 of said bill, it admits that it did not issue a patent to the Omaha tribe of Indians for the lands as provided in Sec. 8 of the Act of Congress of August 7, 1882, (22 Stat. 341) but it denies each and every other allegation of said paragraph ten.

Sixth.

It admits that plaintiff was born on or about the date alleged in said amended bill, and that the parents of complainant were members of the Omaha tribe of Indians, and complainant was since and now is a member of said Omaha Tribe of Indians, but denies each and every other allegation of said paragraph 16.

Seventh.

It denies each and every allegation contained in said amended bill of complaint except that which is herein specifically admitted to be true.

Eighth.

The United States of America for further answer to the amended bill of complaint herein avers that Congress, upon the petition and request of the aforesaid Omaha Tribe of Indians, and the Council of said Tribe of Indians, under date of May 11, 1912, passed an Act

found in 37 Statutes at Large, part 1, page 111, to which Act reference is hereby made.

Ninth.

That none of the lands set forth and described in said amended bill of complaint and which plaintiff seeks to have allotted to him come within any of the exceptions of the aforesaid Act of Congress of May 11, 1912.

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Tenth.

That by virtue of the Acts of Congress relative to the Omaha Tribe of Indians, of March 16, 1854, (10 Stat. 1043) of March 6, 1865 (14 Stat. 667) of August 7, 1882 (22 Stat. 341) of March 3, 1903 (27 Stat. 630) and of May 11, 1912 (37 Stat. 341), all of the unallotted lands on the Omaha Indian Reservation in the State of Nebraska are to be sold at public sale under such rules and regulations as the Secretary of the Interior may prescribe and at the time plaintiff filed said amended bill of complaint herein in this Court and instituted action therein, there were no lands on the Omaha Indian Reservation in the State of Nebraska subject to allotment to the members of the Omaha Tribe of Indians and there were no lands on said reservation belonging to said Omaha Tribe of Indians subject to allotment and the lands described and asked to be allotted plaintiff in the amended bill of complaint herein, were not at the time said amended bill of complaint was filed, subject to allotment, and said lands are not now subject to allotment.

Eleventh.

That the defendant holds the title and control of the land set forth and described in plaintiff's bill of complaint in trust for said Omaha Tribe of Indians collectively and individually as their interests and rights have been from time to time determined by the Secretary of the Interior, and by the several Acts of Congress passed in relation thereto, as above set forth, and is charged with the duty of protecting the rights of said tribe and the individual members thereof in the use and occupancy of said lands and its and to the rents and profits therefrom, and from the proceeds of the sale of said lands as provided by the aforesaid Act of Congress of May 11, 1912.

Twelfth.

Defendant further alleges that prior to the filing of the amended bill of complaint herein, the said lands so prayed to be allotted to the complainant were duly set aside by the proper authorities of the United States, on the request of the Omaha Tribe of Indians, for school and cemetery purposes, and same now are, and were at the

time of the filing of said amended bill of complaint, being used for such purposes.

Wherefore, defendant prays that the allegations and prayer of plaintiff's amended bill of complaint filed herein be denied and that defendant may go hence without day and recover costs of this suit.

T. S. ALLEN,
United States Attorney.
HOWARD SEXTON,
Assistant U. S. Attorney.

G. C. ANDERSON,
Of Counsel.

Endorsed: Filed in the District Court on May 1, 1917.

(Hearing, March 30, 1918; Case Consolidated for Trial with Equity Case No. 3, and Other Pending Indian Allotment Cases.)

September Term, 1917.

Before Judge Woodrough.

This cause came on for trial to the Court the parties hereto appearing by their respective attorneys; testimony is heard and the trial of said cause not being concluded at the hour of adjournment, further proceedings herein are postponed until April 3rd, 1918.—For the purpose of trial it is ordered that this case be consolidated with No. 3 Equity and other pending Indian Allotment cases.

(Hearing, April 3, 1918.)

April Term, 1918.

Before Judge Woodrough.

This day this cause came on for further hearing, the parties hereto appearing by their respective attorneys; further testimony is heard and the trial of said cause not being concluded at the hour of adjournment, further proceedings herein are continued until April 5, 1918.

(Hearing April 5, 1918.)

April Term, 1918.

Before Judge Woodrough.

This day this cause came on for further hearing the parties appearing by their respective attorneys; testimony is heard and said

cause is continued for final argument and submission, to May 6, 1918.

21 (*Decree of the District Court, July 27, 1918.*)

April Term, 1918.

Case No. 11 "Z."

HIRAM CHASE, JR., Minor, etc.,

VS.

UNITED STATES OF AMERICA.

Before Judge Woodrough.

This cause having heretofore, on the 13th day of May, A. D. 1918, been argued and submitted to the court upon the bill of complaint, the answer of the United States of America, defendant, and the evidence, and the Court being fully advised in the premises doth find on the issues joined, in favor of the said defendant.

The Court further specially finds that all of the questioned signatures of Indians to petitions on file in the Department of the Interior, in Washington, D. C., photostat copies of which have been produced herein in evidence, are the valid signatures of said Indians to said petitions.

It is therefore ordered, adjudged and decreed, that this cause be and the same is hereby dismissed, and that the defendant, United States of America, go hence without day; that the costs herein be taxed to the complainant and that the defendant have execution to recover its costs herein expended. To all of which findings and decrees the complainant herein excepts.

(Assignment of Errors.)

Now comes the complainant and files the following assignment of errors upon which he will rely upon his appeal from the decree of this court entered in the above entitled cause.

1. The United States District Court for the District of Nebraska, Omaha Division, erred in entering its decree of dismissal of the complainant's bill and in entering judgment for the defendant.

2. The Court should have found under the pleadings and evidence that the complainant was entitled to the relief prayed for and should have entered a decree finding that the complainant was entitled to an allotment of the lands described in the complainant's bill of complaint.

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the Court and

prays that disposition may be made of the same as by law in
 22 such cases made and provided; and complainant prays a reversal of that order and decree of dismissal of complainant's bill of complaint entered by said Court.

JOHN LEE WEBSTER,
 HIRAM CHASE,
Solicitors for Complainant.

Filed July 27, 1918, R. C. Hoyt, Clerk.

(Petition for Appeal.)

The above named complainant, feeling aggrieved by the order and decree entered in the above entitled cause wherein and whereby it was ordered, adjudged and decreed that the complainant's bill of complaint be dismissed at complainant's costs, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specified in the assignment of errors filed herein, and prays that this appeal may be allowed and that a transcript of the record, papers and proceedings, upon which said order and decree was made, be duly [authenticated] and transmitted to the United States Circuit Court of Appeals for the Eighth Circuit.

HIRAM CHASE,
 JOHN LEE WEBSTER,
Solicitors for Complainant.

Filed Jul- 27, 1918, R. C. Hoyt, Clerk.

(Order Allowing Appeal.)

On motion of John Lee Webster, solicitor for complainant, it is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final decree heretofore entered herein be and the same is hereby allowed, and that a certified transcript of the record, testimony and of all proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Eighth Circuit, and that a bond on appeal be fixed at the sum of \$500.00, the same to act as a bond for costs.

J. W. WOODROUGH,
United States District Judge.

Filed Jul. 27, 1918, R. C. Hoyt, Clerk.

(Citation and Acceptance of Service.)

The United States of America to United States of America, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this

Citation bears date, pursuant to an appeal, filed in the Clerk's office of the District Court of the United States for the District of Nebraska, wherein Hiram Chase Jr., minor, by his next friend Hiram Chase, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable the Judges of the District Court of the United States for the District of Nebraska, this 29th day of July, A. D. 1918.

J. W. WOODROUGH,
United States District Judge, District of Nebraska.

Service of this Citation is accepted this 29th day of July, A. D. 1918.

UNITED STATES OF AMERICA,

Appellee.

By HOWARD SAXTON,

His Ass't Attorney.

Endorsed: Filed in the District Court on July 29, 1918.

(Bond on Appeal.)

Know All Men by these Presents: That we, Hiram Chase Jr., a minor by his next friend Hiram Chase and L. C. Brownrigg and W. E. Rogers, are held and firmly bound unto United States of America in the full and just sum of five hundred dollars (\$500.00) to be paid to the said United States of America its heirs, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 21st day of September, A. D. 1918.

Whereas, lately at the April 1918 term A. D. of the District Court of the United States for the District of Nebraska, in a suit depending in said Court between Hiram Chase Jr., a minor, by his next friend Hiram Chase plaintiff and United States of America, defendant a decree was rendered against the said Hiram Chase Jr., a minor, by his next friend Hiram Chase, and the said Hiram Chase Jr. a minor by his next friend Hiram Chase has obtained an appeal of the said Court to reverse the decree in the aforesaid suit, and a Citation directed to the said United States of America citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the Condition of the above obligation is such, That if the said Hiram Chase Jr., a minor by his next friend Hiram Chase shall prosecute said appeal to effect, and answer all damages and

costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

HIRAM CHASE, JR., *A Minor*,
By His Next Friend, HIRAM CHASE, [SEAL.]
By JOHN LEE WEBSTER,
His Attorney.
L. C. BROWNRIGG, [SEAL.]
W. E. ROGERS, [SEAL.]

Scaled and Delivered in Presence of

JOHN NICHOLSON.

Approved by

J. W. WOODROUGH,
Judge.

Endorsed: Filed in the District Court on Sept. 21, 1918.

(*Precipe for Transcript.*)

To the Clerk of said Court:

Please prepare transcript in above cause, for the Circuit of Appeals, Eighth Circuit, same to consist of the following:

Original Bill of Complaint, & Demurrer thereto.

Memo. opinion and Order on Demurrer.

Amended Bill of Complaint.

Answer.

Trial proceedings consolidation and Decree.

Assignment of errors.

Petition for Appeal.

25 Order Allowing Appeal.

Citation.

Bond.

State of the Evidence with stipulation of parties and Certificate of the Judge.

Precipe for Transcript.

Clerk's certificate.

HIRAM CHASE, JR., *A Minor*,
By His Next Friend, HIRAM CHASE, *Appellant*,
By JOHN LEE WEBSTER, *Solicitor.*

Received copy of foregoing Precipe this 21st day of September 1918.

HOWARD SAXTON,
Assistant U. S. Attorney.

Endorsed: Filed in the District Court on Sept. 21, 1918.

(Statement of Evidence in Consolidated Cases.)

Filed in the U. S. District Court, September 21, 1918.

In Equity.

No. 11 Z.

HIRAM CHASE, JR., Minor, by His Next Friend, HIRAM CHASE,
Complainant,

vs.

UNITED STATES of AMERICA, Defendant.

Equity.

No. 3.

MARY GILPIN, a Minor, By Her Next Friend, SAMUEL GILPIN,
Complainant,

vs.

UNITED STATES of AMERICA, Defendant.

A Transcript of the Evidence Taken in the Two above Entitled Equity Causes which were Consolidated for the Purposes of Trial, together with Other Indian Allotment Cases Similiar in Nature which were Tried and Submitted to the Court at the Same Time.

Be it remembered, that on the 30th day of March, 1918, before the District Court of the United States in and for the District of Nebraska, Omaha Division, J. W. Woodrough, Judge, presiding, the above entitled causes were called for trial, together with a large number of other similar cases relating to cases of Indian allottees, and the following proceedings were had.

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Evidence on Behalf of Complainants.

William Ross King, after being first duly sworn, testified for the complainant as follows:

I am a practicing lawyer and am in the office of John Lee Webster, attorney at law, in the city of Omaha.

On the 21st day of August, 1912, I transmitted to the Secretary of the Interior by registered mail claims for allotments of lands in behalf of the complainants herein. (Copies of which claims for allotments of lands are handed to the witness.) There is attached to the claims for allotments a receipt from the postoffice at Omaha showing that the same were registered by the Registry Department of said

postoffice, and I know that the signature thereto was made by a person connected with the Omaha postoffice, and which registry receipt reads as follows:

"Letter No. 6926.

P. O. Omaha, Nebr.

Received for registration Aug. 21, 1912, from J. L. Webster, 837 Om. Nat. Bk. addressed to Secretary of the Interior, Washington, D. C.

1 class postage prepaid.

POSTMASTER,
Per M."

There was another package sent by registered mail under date of February 6, 1913. The answers which I have just given to the former question apply equally to the papers transmitted February 6, 1913.

There is offered in evidence in behalf of Mary Gilpin, by her next friend, Samuel Gilpin, a claim for allotment, indented and testified to by the witness William Ross King, and which reads as follows:

"Notice of Claim to Allotment of Lands on Omaha Indian Reservation.

To the Honorable the Secretary of the Interior, Washington, D. C.

SIR:

You are hereby notified that the undersigned is an Indian of the Omaha tribe of Indians, and claims to be, and asserts a right to an allotment of lands on the Omaha Reservation under the provisions of the treaty of March 6th, 1865, and of the Act of Congress, approved August 7th, 1882, and as amended by the Act of March 3rd, 1893, all relating to the lands of the Omaha tribe of Indians, designated as

Omaha Reservation, and to allotments of lands thereunder.

27 and has selected for allotment the following described lands:

West $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 26, Town 25 Range 9 east of the 6th Principal Meridian in Thurston County, Nebraska, and request- and prays that said allotment may be approved by or under the direction of the Secretary of the Interior, and that a patent may issue therefor as provided by law in that behalf.

Very respectfully,

MARY GILPIN, A Minor,
By Her Next Friend, SAMUEL GILPIN."

(All the other claims for allotments testified to by the witness William Ross King are similar in form to that above copied herein, excepting only in description of the real estate claimed for allotment.)

William Ross King further testified: At the time I transmitted these claims for allotment under date of August 21, 1912, by regis-

tered mail, John Lee Webster, attorney for the claimants herein, wrote a letter to the Department of the Interior advising the Department of the transmission of these claims for allotment, and he received an answer thereto which reads as follows:

"Department of the Interior, Office of Indian Affairs, Washington.

Land-allotments 85119-1912.

J. T. R.

Sep. 6, 1912.

Allotments—Omaha.

Mr. John L. Webster,
Attorney at law,
837 Omaha National Bank,
Omaha, Nebraska.

SIR:

The Office is in receipt by Departmental reference of your letter of August 21, 1912, transmitting eighteen notices of claims to allotment on the Omaha Reservation filed in behalf of the persons whose names are listed below:

28	Henry Clay.	Nellie Webster.
	Alice Springer.	Charles Fields.
	Mary Gilpin.	James Gilpin.
	Mary Lamson.	Jeanette W. Peabody.
	Harriet Lamson.	Henry Grant.
	Rose H. Grant.	Mariam Brownrigg.
	Rose D. Porter.	Glen Brownrigg.
	Jesse W. Wickersham.	Russel Chase.
	Arthur Pilcher.	Herbert Johnson.

The right to allotment is claimed under the provisions of the Treaty of March 6, 1865, (14 Stat. L., 667), the Act of August 7, 1882 (22 Stat. L. 341) and the Act of March 3, 1893 (27 Stats. 630).

To enable the Office to determine the right of the applicants to allotment, it will be necessary for you to furnish in each case the date of birth, as under the provisions of the Act of March 3, 1893, *supra*, allotments are confined to members of the tribe then living. In connection herewith attention may be invited to the Act of May 11, 1912, (Public 153), authorizing the disposal of the surplus lands within the Omaha Reservation.

Respectfully,

C. F. HAUKE,

Second Assistant Commissioner."

9-V. A.R.-5.

William Ross King further testified: I transmitted to the Attorney-General of the United States by registered mail on February 5, 1913, copies of the petition filed in these respective cases, and I produce the receipts therefor from the Registry Department of the

United States Post-office at Omaha, which are received in evidence and one of which reads as follows:

"Parcel No. 29462.

P. O. Omaha, Nebr.

Received for registration Feb. 5, 1913, from J. L. Webster 837 Om Natl. Bk. addressed to Att'y-Gen. of U. S. Wash. D. C.

1 class postage prepaid

POSTMASTER,
Per B. D."

Hiram Chase, testified in behalf of plaintiffs, two of the original suits were brought in this Court before the Act of Congress providing for the sale of these lands and before John Lee Webster was employed as attorney to take charge of the cases. Mr. Chase further testified: I did have the original applications for allotment of lands to Hiram

Chase, Jr., and to Nellie Hallowell. I did transmit to the
29 Interior Department said applications for allotments for lands described in the petitions in the Hiram Chase, Jr., case and in the Nellie Hallowell case. The said applications in behalf of these respective claimants were denied by the Department in a letter written to me in reply to my communication. I am not able to produce said applications for allotment which were transmitted to the Department nor the letters written to me in reply thereto. I had the possession of these papers but in moving the papers got mislaid and I looked for them and could not find them anywhere. Either they were destroyed or lost or mislaid. I cannot find them anywhere.

Evidence in Behalf of the United States of America, Defendant.

The defendant offers in evidence a letter from A. C. Tonner, Acting Commissioner of Indian Affairs, to John K. Rankin, U. S. Special Agent, which reads as follows:

"Department of the Interior,

Office of Indian Affairs,

Washington, April 24, 1899.

John K. Rankin, Esq.,

U. S. Special Agent,

Washington, D. C.

Sir:

Upon receipt of these instructions you will proceed to the Omaha and Winnebago Agency, Nebraska, and the reservations attached thereto, for the purpose of completing allotments to the Winnebago Indians, and of making certain [add-tional] allotments to the Omahas.

Winnebago.

The Act of February 21, 1893 (12. Stats. 658), authorized the sale of the reservation of the Winnebago Indians in Minnesota, their removal to a new location and the allotment of lands to them in quantities 'not exceeding eighty acres to each head of a family other than to the chiefs, to whom larger allotments may be made.'

The reservation selected for those Indians under the provisions of said Act not proving satisfactory, a treaty was made with them (October 22, 1864, 14 Stats. 671) by which they relinquished the same and accepted in lieu thereof a tract of land in Nebraska containing some 90,000 acres, to which has been added 12,347 acres, purchased from the Omahas under the provisions of the Act
30 of June 22, 1874, (18 Stats. 170).

Under the act of 1863, some 487 patents were issued to those Indians, mostly for eighty acres each.

Under date of July 1, 1867, the President granted authority for making allotments in severalty to those Indians under the act of February 6, 1887, (24 Stats. 388), and on July 27, 1887, instructions were given Special Agent Fletcher, who had been assigned to the work.

She was instructed as follows regarding the allotments under the Act of 1863:

'The Agent reports that probably less than half of the allottees know where their land is, owing to the careless manner in which the allotments were made, and recommends that the land be re-allotted.

Your first duty, therefore, will be to clear the land not occupied and not desired by the patentees of the title granted by patent.

To do this you will require each allottee who has not occupied his land, who has occupied and improved other land, or who desires for satisfactory reasons (not merely from caprice or desire for change) to execute upon the back of his patent a formal relinquishment to the United States of all his right, title, and interest in and to the lands covered thereby in consideration of being allowed to take a new allotment.

Where it is found that a patented tract is vacant or occupied by a party other than the patentee, and the patentee cannot be found or his relinquishment obtained, the fact should be substantiated by evidence and the case reported to this office for special instructions.'

September 17, 1887, she was instructed as follows:

'The patents that are held at the Agency, if in favor of persons who were not in existence, should be regarded as void. They should be forwarded to this office with a statement of the facts.'

Special Agent Fletcher completed her work of allotting the Winnebago January 8, 1889.

As the result of her labors in investigating the previous allotments, she obtained the relinquishment of 76 patents, one having been pre-

viously relinquished; ascertained that 74 patentees had died, leaving heirs; that 7 had died leaving no heirs; and that 273 patent
31 had been issued to fictitious persons, of which number she recovered and transmitted 207 with her report. Fifty-six patents were retained by the patentees who hold the land covered thereby as part of their allotments.

November 2, 1889, this office submitted the schedule to the Department with recommendation that they be approved and the 273 fictitious patents cancelled.

September 4, 1893, the Department having decided that there was no authority of law for the cancellation of the so-called fictitious allotments, requested that a schedule of Winnebago allotments not in conflict with outstanding patents be made and submitted to it.

Accordingly this office, on September 25, 1893, submitted the original schedule which had been prepared by eliminating all conflicting allotments and descriptions by drawing a red line through such allotments and descriptions, and where necessary, correcting the descriptions and quantities in red ink, thus preserving in one schedule the allotments as originally made, and as corrected. It was approved by the Department September 28, 1893.

As a result of this action some 259 allottees have thus far failed to receive their allotments in whole or in part.

February 24, 1894, the Department cancelled the patents, regarded as fictitious, which had been recovered and returned to this office to the number 207.

One other patent has since been relinquished and cancelled.

A list of the cancelled patents will be sent you.

Two have been re-issued and a number of tracts have been allotted. These are shown on the list.

There now appears to be vacant within the reservation some 10,937 acres never allotted and some 14,401 acres, which were covered by the cancelled patents, a total of some 25,339 acres.

Special Agent Fletcher reported that there were 3,504 acres of timber land which she deemed it important to reserve and retain for the common use of the Indians.

It is roughly estimated that some 20,400 acres will be required to complete the allotments so as to give each allottee on Special Agent Fletcher's schedule, the quantity of land to which he was entitled July 1, 1887.

Consequently, the quantity of the land in the reservation
32 is not sufficient to allow the revision and equalization provided for in Section 2 of the Act of February 28, 1891, (26 Stats. 794).

The only practicable plan seems to be to allot those whose names appear upon the schedule, the quantity of land to which they were entitled at the time the allotments were made.

Before proceeding to make the allotments a thorough investigation should be made to ascertain whether there are any claimants on behalf of the patentees whose patents have been cancelled, either as being the original patentees, or heirs of such patentees. In case such patentees, or their heirs, appear, their claims should be thoroughly

investigated, and if their claims are sustained by sufficient evidence, the land covered by the patent thus shown to have been issued to an actual person, should not be allotted.

You will consult with Agent Mathewson upon this subject. It is understood that a list of allottees has recently been found at the Agency, in which Indian names are given by which it may be possible to trace and identify some of the supposed fictitious allottees. A list of all canceled patents to which a valid claim is established should be furnished this office as soon as possible.

Having thus ascertained what lands covered by the cancelled patents are clear of all valid claims you will proceed to make the allotments.

Each head of a family is entitled to 160 acres. Each single person, over, and each orphan under, eighteen years of age to 80 acres, and each other person born before July 1, 1887, to 40 acres, from which is to be deducted the quantity which each had received under the Act of 1863, or 1887, or both. A copy of the schedule made by Special Agent Fletcher, showing the eliminations made on account of the outstanding patents, and the corrections since made, is transmitted for your information.

This schedule shows who are entitled to allotments and the quantity of land collected under the Act of 1887.

For your further information there is transmitted a list of the patents treated as fictitious by Special Agent Fletcher, but which have not been recovered, and consequently not cancelled. The allottees who were given lands covered by those patents will be compelled to select other lands.

33 Allottees who have died are entitled to have their allotments completed, and their heirs should be allowed to make the selections. Heads of families will be allowed to select for themselves and minor children, and other persons for themselves.

It is thought possible that some selections may be on file at the Agency. Agent Mathewson should be consulted on this point.

If there are any members of the tribe who were entitled to allotments at the time the work was being done by Special Agent Fletcher, but who failed for any reason to be allotted, they should now be allotted the quantity of land to which they would have been entitled July 1, 1887.

You will prepare a schedule, in duplicate, of the allotments made, giving each allottee the same number as on the Fletcher schedule.

If there are any new allottees they should be numbered consecutively, commencing with number 956.

Omahas.

The Indian Appropriation Act approved March 3rd, 1893, (Annual Report for 1893, p. 506), contains the following provisions relative to these Indians:

That the act of Congress approved August seventh, 1882, entitled 'An Act to provide for the sale of a part of the reservation

of the Omaha tribe of Indians in the State of Nebraska, and for other purposes.' Be, and the same is hereby, amended so as to authorize the Secretary of the Interior with the consent of the Indians of that tribe, to allot — severally through an allotting agent of the Interior Department, to each Indian woman and child of said tribe born since allotments of land were made in severalty to the members thereof under the provisions of said act, and now living, one-eighth of a section of the residue lands held by that tribe in common instead of one-sixteenth of a section, as therein provided, and to allot in severalty to each allottee under said act, now living, who received only one-sixteenth of a section thereunder, an additional one-sixteenth of a section of such residue lands; Provided That the allotments so made shall be subject to the same conditions, restrictions, and limitations provided for in Section 6, seven and eight of said act touching allotments and patents to be allotted therein mentioned; And Provided, that the expenses incurred in making the allotments

34 hereby authorized shall be defrayed out of the funds appropriated for surveying and allotting Indian Reservations."

Section Five of the Act of August 7, 1882, (Annual Report for 1882, p. 215), provided for allotments in severalty to the Indians of said tribe in quantity as follows:

"To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age one-eighth of a section; and to each other person under eighteen years of age, one-sixteenth of a section."

In accordance with this provision allotments were made to the members of said tribe, the total number of allottees of all classes being 954, and the same were approved by the Secretary of the Interior July 11, 1884. Patents for the lands so allotted were issued to the respective allottees December 29, 1884, as provided in Section Six of said Act.

The whole number of acres allotted on said reservation is 77,786.6 acres, leaving a residue of 64,558 acres, including 640 acres occupied by the Agency School and 4.90 acres by the Woman's National Indian Association.

The Act of August 7, 1882, provided that the unallotted land should be held in common by the tribe, and a trust patent issued therefor; and that from these unallotted lands, allotments should be made to each Omaha child born prior to the expiration of the trust period (25 years) and trust patents issued therefor, which patents, it was provided, should override the tribal patent.

The tribal patents have not been issued, however, and no allotments have been made to children born since the original allotment were completed.

It is held that the effect of the Act of March 3, 1893, is to give each and every member of the Omaha tribe who was alive on that day, and who had not previously received that quantity, 80 acres of land.

There are three classes to be allotted:

1st. Married women who had not received allotments or who had not received but 40 acres, now entitled to 80 acres, less amount previously allotted.

2nd. Those who were allotted as minors, and are now each entitled to 40 acres additional.

35 3rd. Those born since the original allotments were made, entitled to 80 acres each.

The first class includes widows, who were not allotted originally.

You will observe that no person who died before March 3rd, 1893, is entitled to an allotment, nor is any person who was born after that date.

It is roughly estimated that 366 persons who were allotted 40 acres each are entitled to an additional allotment of 40 acres each,—a total of 14,640 acres; that 334 children born between the making of the original allotments and March 3rd, 1893, are entitled to 80 acres each, a total of 26,770 acres; and that there are 204 married women entitled to 80 acres each, a total of 16,320 acres.

According to this estimate it will require 57,680 acres to make all the allotments, leaving a surplus of only about 6,000 acres.

In connection with the Agent, you will call a full council of the male adult members of the tribe, and lay before them the provisions of the Act of 1893, which should be fully explained to them on the lines above indicated.

Their consent should then be asked, and a vote taken. The affirmative vote should be a majority of all the male members of the tribe. If a full council can be had it will not be necessary to obtain the consent of the tribe in writing, but if a majority cannot be assembled, you will report the fact to this office for further instructions.

It is understood, however, that the Indians are anxious to have the allotments made.

The proceedings of the council and the result of the vote should be duly attested by the Agent.

Having obtained their consent, you will proceed to make the allotments, as before indicated. Adult Indians should be permitted to make their own selections, heads of families selecting for their minor children, and the heirs of deceased allottees selecting for the person from whom they inherit.

A schedule in duplicate should be prepared, the allottees to be consecutively numbered. Where a person has been previously allotted, his number on the previous schedule should be given. If not previously allotted his relationship to the head of his family should be shown, giving the number of such head on the previous schedule.

36 Both Indian and English names should be given.

You will employ a surveyor and the necessary assistants who should be Indians in all cases where practicable, to enable you to run the lines of each allotment and re-establish such monuments as may be found requisite. For such persons you will furnish the

proper vouchers and report the employees upon a list of irregular employees. You will also employ an interpreter, when necessary, and report him upon your list of Irregular Employees. For these expenses and your per diem and traveling expenses you will submit the usual estimate of funds. The Expenses attending the work on the Winnebago Reservation are payable from the appropriation for allotments under the Act of 1887, reimbursable. Those attending the work on the Omaha Reservation are payable from the appropriation for surveying and [allot-ting] Indian Reservation, for the year in which the work is done.

The plats and the necessary blanks will be forwarded to you at the Agency. The filed notes are supposed to be on file there.

You will make weekly reports upon the usual form.

Very respectfully,

A. C. TONNER,
Acting Commissioner.

J. F. A. (G.)

Approved:

Secretary.

The defendant offered in evidence a letter under date of May 1, 1899, from Mathewson, U. S. Indian Agent, which reads as follows:

"Omaha & Winnebago Agency, Nebraska.

May 10, 1899.

By direction of the Honorable Commissioner of Indian Affairs is a letter of April 24th, 'Land,' to the Honorable John K. Rankin, U. S. Special Agent, due notice having been given, a full council of the Omaha Indians was held on the 9th day of May, 1899, when the provisions of the Act of Congress approved March 3, 1893, in relation to the allot-ting in severalty of the residue of the Omaha tribal lands, was fully explained and the consent of the tribe was asked and a vote taken, resulting in 156 male members of lawful age voting to give their consent to the carrying out of the provisions of the law and none voting in the negative, the total male membership of the tribe of lawful age at this date being 270, 1136 being the required majority. Special Agent Rankin was present and fully explained the provisions and effect of the law, and the sentiment of the Omahas in favor of the proposition was practically unanimous.

CHAS. P. MATHEWSON,
U. S. Ind. Agent.

The defendant offered in evidence a communication to Commissioner of Indian Affairs signed by certain members of the Omahas which reads as follows:

"To Hon. T. J. Morgan,
Commissioner of Indian Affairs,
Washington, D. C.

SIR:

We, the Omaha Indians, assembled in Council this 2nd day of January, 1891, have appointed Wajacpa, Thomas McCauley and Henry Blackburn to carry to you the following petition for your immediate consideration, decision and action. We would further say that they are not authorized by us to transact any other business in the name of the tribe, nor have we either asked for or desired any white person or persons, who may have gone or are about to go to Washington from this county to speak in our behalf.

1st. Your law tells us that all those who lived with us as members of our tribe in 1865 have rights to lands and annuities but that no others have such rights. Now we have nothing to say of half breeds who were born or adopted into our tribe and raised with us. They are the same as Omahas. But there are certain ones living among us we do not want. We do not hate them, but we think they have no rights here. They are Wm. Barada, Thomas Sloan, Mrs. Fulton Peters, Frank Peters, Walter Peters and Mrs. Taylor—and their families. And we understand that others are expecting to come. When we were allotting our lands one of these, Mrs. Fulton Peters, came here to claim land. We asked her, 'Who was your father?' She replied, 'A Frenchman.' 'Who was your Mother?' 'A French woman.' 'Where were you born?' 'In St. Louis' was her reply. We told her that she had better go home, for she had no right here. The all got Nemaha land and their children were born and raised there. They are coming here without our consent and without saying anything to us, they are breaking up large farms and cutting and selling our grass, and when our grass Commissioners ask them for pay or rent, they will not listen to them. You told us that you would hold our land in trust for twenty-five years. And we think these people are not only opposing us but you also, and we look to you to decide this matter at once and do what is right. If they have rights here we want to know it. If they have no right, we expect you to put them off.

2nd. We ask for a further allotment of our unallotted lands to all who are entitled to them that they may be on an equality with us. All minor children received but forty acres, and many of them have lands which they cannot work. A good many are now married and have families, but have no land suitable to live upon and provide for their families. And in justice to them they should have additional allotments and we also believe that children born since the allotment are entitled to and should have lands which their parents can use for their maintenance. And according to the existing laws our wives do not hold any lands in their own right as all other members of our tribe do. We believe this to be a great injustice to them also. We would therefore petition the Interior Department to recommend to Congress the passage of a law giving

to adults, wives and minors an equal share of land, that justice may be done to all.

2rd. You have promised to give us the interest on the deferred payments on lands sold under the act of 1882, on or before March 1st, 1891. Your promises are good but often very slow. We have no good seed, wheat or corn, and we need more farming implements. And unless these are secured in time for spring work and seeding, it will work great hardships to us. We have asked our delegation to lay our needs before you that there may be no delay beyond March 1st, 1891.

There are certain other half breeds who have received allotments with us, but are now living with other tribes. We want to know if they can receive annuities in more than one tribe at the same time. If they have drawn annuities elsewhere, shall they draw with us from the coming money the same as though they were still living with us? And we want you to send your reply to our delegation in writing that we may know with certainty what you say.

39 Signed in behalf of the Omahas by

TWO CROWS.
JOHN BIG ELK.
WHITE HORSE.
LITTLE COOK.
PRAIRIE CHICKEN.
CHAGAE NINJAE.
DUBAEMEMIE.
JOHN PILCHER,
Interpreter.
LITTLE CHIEF.
SINDARHAHA.
WAHAMYAE.

The defendant offered in evidence a letter from the Commissioner of Indian Affairs dated January 12, 1891, which reads as follows:

"Department of the Interior,

Office of Indian Affairs,

Washington, January 12, 1891.

Wajaepa, Thomas McCauley and Henry Blackbird,
Omaha Delegates.

MY FRIENDS:

According to promise made to you in our conference this morning I have to say in answer to some of the questions presented by you that:

First. On October 2, 1890, I recommended to the Secretary of the Interior that the matter of intruders upon the Omaha reservation be laid before the Secretary of War, with the request that he would cause the commanding officer of the nearest military post

to the Omaha reservation, to furnish, upon the application of Agent Ashley, proper military aid to eject from the unallotted lands of said reservation Frank Peters, and such other persons, including Walter Peters, William Barada and Luke Sailor, as the Agent should designate as being unlawfully upon said reservation under a state of facts similar to those existing in the case of the said Peters.

40 Upon your urgent request for prompt action looking to the removal of these parties from the reservation (you make special mention of William Barada, Thomas Sloan, Mrs. Fulton Peters, Frank Peters, Walter Peters, and Mrs. Sailor and their families). I have again, today, written to the Secretary inviting attention to my former letter and requesting that the matter be submitted to the Secretary of War at an early date. I shall also write to Agent R. H. Ashley directing him not to allow the names of any of these intruders to be placed upon the pay roll nor to admit them to participation in the coming payments to be made to the Omaha tribe per capita.

This office has held from the beginning of the controversy that Frank Peters and others of his class were not entitled to lands or other benefits under the Omaha Act of August 7, 1882, (22 Stats. 341), and I do not propose to admit them to any of the money or other benefits of the tribe to which they are not entitled by law.

Second. Without discussing the question of the propriety of making additional allotments of land so that some of the children who have become of age since 1883 and have married and are now heads of families, may have larger holdings, or the other proposition to allow persons who have selected bad or inferior land to exchange their allotments for other and better land, I have to say that all this would require legislation, and it is too late in the session to introduce a bill with the hope of its passage by the present Congress. As all measures pending on adjournment die with the Congress, all the correspondence and other work would have to be repeated de novo, and another bill introduced in the next Congress. Therefore, it would be idle to attempt to procure legislation at this time.

As regards the case of children who have been born since the allotments were made in 1883, I have to say that the law makes all necessary provision for them. The 8th section of the Act aforesaid after providing for the issuance of a trust patent to the tribe in common for the residue of lands not allotted to individual members of the tribe, provides: 'That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section six of this Act, touching patents to allottees therein mentioned.' * * *

41 It is my present intention, if the Department will so authorize and doubtless it will, to send Miss Alice C. Fletcher, who made the allotments to your people in 1883 and who is now a Special Agent of this Bureau to allot lands in severalty to Indians, to visit your reservation in the spring, on her way to Idaho, and

make allotments to all the Omaha children born since the allotments of 1883 were made.

I agree with you that married women should have allotments in their own name, and should legislation be sought covering the other matters which you desire to have done, this subject might be included.

Very respectfully,

T. J. MORGAN,
Commissioner."

The defendant offered in evidence a communication from Ashley Indian Agent, to Commissioner of Indian Affairs dated August 24, 1891, which reads as follows:

"United States Indian Service,

Omaha and Winnebago Agency,

August 24th, 1891.

To the Hon. Commissioner of Indian Affairs,
Washington.

SIR:

At a Council of the Omaha Indians had a few days since, it was the united voice of the tribe, that if it is possible they would have the law so changed, that every child should have 80 acres of an allotment, not 40 as now provided, this to apply to all that have been allotted 40 acres, as well as those who have been born since the date of the allotment, and who will be entitled to land under the existing law.

I would most respectfully request that that question be considered by your office, and if deemed advisable, that a bill be presented at the next Congress.

Very respectfully,

ROBERT H. ASHLEY,
United States Ind. Agent."

42 The defendant offered in evidence a letter from Ashley Indian Agent, to Commissioner of Indian Affairs under date of May 11, 1892, which reads as follows:

"United States Indian Service,

Omaha and Winnebago Agency,

May 11th, 1892.

To the Hon. Commissioner of Indian Affairs, Washington.

SIR:

The Omaha Indians in council requested me to write the Department asking that they be allowed to send a delegation to Washington. They inform me that they wish to see about the allotment for

children born since the date of last allotment. They also say that the expense of the trip can come from the funds derived from the leasing of the tribal lands.

I am of the opinion that the journey is unnecessary and that they can receive all the information by letter.

Very respectfully,

ROBERT ASHLEY,
U. S. Indian Agent."

Defendant offered in evidence a letter from the Acting Commissioner of Indian Affairs, to Ashley, Indian Agent, under date of May 19, 1892, which reads as follows:

"Department of the Interior,

Office of Indian Affairs.

Washington, May 19, 1892.

Robert H. Ashley, Esq.,

U. S. Indian Agent,

Omaha and Winnebago Agency,

Winnebago, Nebraska.

SIR:

Replying to your letter of May 11th, 1892, stating that the Omaha Indians in council requested you to ask that they be authorized to send a delegation to Washington for the purpose of seeing about allotments for children born since the last allotment, I have to say that I concur in your opinion that the journey is unnecessary and that the Indians can receive the desired information by letter.

43 I may add for the information of the Indians that "Nebraska" an Omaha Indian was advised by office letter of this date addressed to him at the Omaha and Winnebago Agency, that allotments to Omaha children born since the allotments were made in 1883-4 will undoubtedly be made in due time as the law requires (Act of August 7, 1882-22 Stats. 341), but just when, I cannot say at present; that he need have no anxiety about it, however, for the allotments are authorized by law and will be made whenever the Department shall determine to carry that provision of the Statute into effect.

With this information the Indians will probably not care to visit Washington on this business, and they should be assured that the matter can be as satisfactorily accomplished by correspondence.

There are no funds for payment of expenses of delegates of Indians to this city. If a delegation of the Indians under your charge insists on coming to this city they should deposit in your hands, to be remitted by you to the Commissioner a sufficient sum of money collected for the trip to pay their expenses while here and for the return trip.

Very respectfully,

R. V. BELT,
Acting Commissioner."

(HOLLAND.)

P.

The defendant offered in evidence a letter from Alice C. Fletcher, under date of February 6, 1893, reading as follows:

214 First Street S. E., Feb. 6, 1893.

MY DEAR COM. MORGAN:

I have known George Miller and Philip Stabler over twelve years. They belong to the industrious and progressive farmers and are public spirited in matters concerning the tribe. Neither of them drink. Both these young men with their wives have had the benefit of a short term of training at Hampton. You can trust the accuracy of what they will tell you. They have the respect of the tribe and are accounted incorruptible. I know that the Omahas have earnestly desired the adjustment of their allotment so as to give eighty acres to their children living who received forty acres under the Act of August 7th, 1882, and to have the new children born since the Allotments receive eighty acres. There are in the files of the Department requests to this effect made direct by the Indians and
44 through Agent Ashley and if my memory serves me right as far back as Agent Warner. These men have come to try and secure this legislation before the new allotments are made. I do not know whether Senator Dawes and Mr. Peel can push a new bill through this session or whether it is possible to tuck this provision into the Indian Appropriation bill. If anything can be done please direct these men just what practical steps to take. Can Gen. Whitteley be of service? The measure is of radical importance to the people and it is the only important point touching their interest.

This is my first use of my much suffering head. I commend these little ones to you.

Sincerely your friend,

Alice C. Fletcher."

The defendant offered in evidence letter from Commissioner Morgan under date of February 11, 1893, which reads as follows:

"Department of the Interior.

Office of Indian Affairs.

Washington, February 11, 1893.

Philip Stabler and George Miller,
Washington, D. C.

FRIENDS:

Referring to your interview with me concerning the matter of taking proper steps authorizing allotments of 80 acres to the minor children of the Omaha tribe born since allotments were made to the members thereof, and 40 acres additional to allottees who formerly received only 40 acres, I have to inform you that the following draft of

a note was prepared by this office on the 9th instant and handed to Mr. W. E. Peebles, who, it is presumed has presented the same to Senators Manderson and Dawes with a view to having the same inserted in the Indian Appropriation Bill.

That the act of Congress approved August 7, 1882, entitled, An Act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes, be and the same is hereby amended so as to authorize the Secretary of the Interior, with the consent of the Indians of that tribe, to allot in severalty, through an allotting agent of the Interior Department, to each Indian child of said tribe born since allotments of land were made in severalty to the members thereof under the provisions of said act, and now living, one-eighth of a section of the residue lands held by that tribe in common, instead of one-sixteenth of a section as therein provided, and to allot in severalty to each allottee under said act now living, who received only one-sixteenth of a section thereunder, an additional one-sixteenth of a section of such residue lands;

Provided, that the allotments so made shall be subject to the same conditions, restrictions, and limitations provided for in sections six, seven and eight of said act, touching allotments and patents to allottees therein mentioned; And Provided that the expenses incurred in making the allotments hereby authorized shall be defrayed out of the funds appropriated for surveying and allotting Indian reservations.'

Very respectfully,

T. J. MORGAN,
Commissioner."

(WISE.)

P.

The defendant offered in evidence a letter signed by certain Indians to Commissioner Morgan under date of Jan. 30, 1893, which reads as follows:

"Pender, Nebr., Jan. 30th, 1893.

T. J. Morgan,
U. S. Indian Commissioner.

SIR:

The bearer of these credentials, Mr. W. E. Peebles, goes to Washington on a mission of considerable importance to our tribe. We desire to have an allotment of lands made to our children and others entitled to same, at once. We are all Republicans, and feel that our interests would be looked after better in this matter, if the allotments were made under a Republican Administration.

Mr. Peebles has our entire confidence, and is fully authorized to speak in our behalf.

The principal reason for desiring the allotment of these lands is, that we may be enabled to receive a larger revenue from them.

Unallotted land, under the existing law, can only be leased

for grazing purposes, at a low price, while allotted land can be leased for agricultural purposes, at a much higher figure.

We are,

Respectfully yours,

WHITE HORSE,	his X mark
CINDAHAHA,	X
WAHUNINGA,	X
SHAZINJA,	X
JOHN BIG ELK,	X
ZINGAJAHEGA,	X
WM. WOOD,	X
TWO CROW,	X
DU-BA-MONIE,	X
FIRE CHIEF,	X
LITTLE COOK,	X

Council of the Omaha, Silas Wood, Int.

The defendant offered in evidence a letter from Charles F. Manderson to Acting Indian Agent under date of September 11, 1893, which reads as follows:

"United States Senate,

Washington, D. C.

September 11th, 1893.

Capt. William H. Beck, U. S. A.,

Acting Indian Agent,

Omaha and Winnebago Agency, Nebraska.

MY DEAR SIR:

Your favor of the 6th inst. is received. I sent you by mail today a copy of H. R. 10,415, being the Indian appropriation bill of the last session, and the amendment introduced by me, February 10th, 1893, which was engrafted on the bill. This amendment was prepared by me after several interviews with Mr. W. B. Peebles of Pender, Nebraska. Mr. Peebles' claim that he was instrumental in the introduction and final passage of this amendment has abundant foundation. I know nothing whatever of any contract between him and the Indians of your agency, but I have such confidence in him that I have no question but that his statement is absolutely true.

47 In his several trips here he has done good service for the cause of the Indians of the Omaha and Winnebago Agency.

Truly yours,

CHARLES F. MANDERSON."

The defendant offered in evidence a memorandum of a conversation between the Commissioner of Indian Affairs and Philip Stabler and George Miller, which reads as follows:

"Philip Stabler. I want to ask that before making the new allotments the half-breed question be settled first, so that the lands may be free to be selected by the children who are to take the lands. We are anxious to take our allotments, but we want it arranged so that the children may get the same amount of land as the older people, that is 80 acres apiece, 40 acres is too small to be of much use.

Commissioner: Well, we had that yesterday. If you have anything new, I will be glad to hear it.

Philip Stabler: We do not want the allotments to be made in great haste, as the white men and other Indians want it done. We know Mr. Peebles is working for himself—his own interests, although he appears to be working for the Omahas. That is all.

George Miller: I want to tell you something straight and true. We think the Omahas are getting along very nicely, and we are doing our best, but the white people around us make it very difficult for us to make rapid progress. We came here on our own responsibility, because we knew that the people suspected this man Peebles, as he is always under suspicion, and when we learned that he came on following the first party, we were afraid that something might be wrong, so we came on to find out what was going on. Mr. Peebles is interested in the little town called Pender, and we know that he wants to build it up at the expense of the Indians, but so far we have outvoted the white people. This man Peebles wants to build a very expensive court-house in that little town, so as to further his interests and he is very anxious to have our lands taxed. We were told, and we saw in the newspapers, that that is his main object in coming here. Some of those half-breeds who have brought suit against the Omahas are already selecting lands, and if allotment are now made, we think those selections will be respected and the children crowded out. We do not want to make any great [ha-te] in this allotment work. We want this half-breed questions settled first, one

48 way or the other, so that there would be then no difficulty in making our selections on the remaining lands. Mr. Peebles' friends [friends] have telegraphed him that I came to oppose the allotment work. I do not oppose that at all. I wish the children to have their allotments, and I want them to have the same amount of land that the older people have. That is what I am working for. The Agent does not seem to have any strength at all, although he has tried to protect the interests of the Omahas. Still the men who are grasping our lands seem to have the better strength. Some of these half-breeds who through their shrewdness managed to get allotments have left the reservation and gone to the Osage nation, to be adopted there, and they have leased their lands up there to white people, and not only that, they have leased some unallotted lands to the neighboring whites.

Commissioner: As I understand it, they want this question of the half-breeds settled first; and, second, it will be necessary to secure some additional legislation. Then they want the lands allotted by

some one who will do it carefully. Who would you like to have to make the allotments?

Philip Stabler: We would like to have Miss Fletcher, when she gets well.

Commissioner: Do all of you prefer Miss Fletcher?

George Miller: There are some who are friendly with the half-breeds who would not like to have Miss Fletcher, but the real Indians would like to have her do the work—the most of them would like to have her."

Defendant offered in evidence a letter from Rankin, Special Allotting Agent, to Commissioner of Indian Affairs under date of May 10, 1899, which reads as follows:

"United States Indian Service.

In the Field Winnebago Agency.

Nebraska.

May 10th, 1899.

To the Hon. Commissioner of the Indian Affairs, Washington, D. C.

SIR:

Herewith please find a copy of the record made by the Agent of the proceedings of the Council held May 9th, 1899 with the
49 Omahas at which they almost unanimously accepted the provisions of the law of 1893 providing for additional allotments of their surplus lands. I shall proceed with the work under my letter of instructions.

Very Respectfully,

JOHN K. RANKIN,
U. S. Special Allotting & Dist. Agt."

Defendant offered in evidence a petition to Commissioner of Indian Affairs signed by certain Omaha Indians, which reads as follows:

"Omaha Agency, Thurston Co., Neb., Feb. 20th, 1893.

To the Honorable Assistant Commissioner of Indian Affairs, R. V. Belt:

We, the undersigned petition that the Amendment in regard to the allotment of land to the Omaha Indians, prepared by the Indian Office, Feb. 9th, 1893, be looked after by the friends of the Omaha Indians.

We petition that our lands be allotted to each Indian child of said tribe, born since allotments were made in severalty, under provisions of the Act of Congress, and now living on one-eighth ($\frac{1}{8}$) of a section of the residue lands held by the tribe in common instead of one-sixteenth ($\frac{1}{16}$) wherein provided, and to allot in severalty

to each allottee under said act now living, who received only one-sixteenth (1/16) of a section thereunder, an additional one-sixteenth of a section of such residue lands.

Also that the women of our tribe be allotted as to present, a married woman has no land. (Her name not even being mentioned in the patents.)

That as many of us have only grazing lands, we would petition that we be allowed to exchange lands like these for good farming lands.

That a child born since allotments and who has died since Feb. 1893, be entitled to allotment as well as the living.

We wish the allotments to be made this Spring.

50 We have not asked Mr. W. E. Peebles to do anything in our behalf, and furthermore we wish to say, that we do not wish the Indian Office to accept or endorse anything that W. E. Peebles has done, or may wish to do in behalf of the Omaha Indians.

We hope that the Office will notify our Agent, Mr. Ashley whether the Amendment will pass or not.

Very respectfully,

The undersigned in behalf of the Omaha Indians—

Per S. LA F.

WHITE HORSE.	his	×	mark.
SINDAHAHA.		×	
CHA-ZA-THIN-GA.		×	
LITTLE CHIEF.		×	
BIG ELK.		×	
DWBA-MENTHE.		×	
FIRE CHIEF.		×	
TWO CROW.		×	
NUGA.		×	
ROBERT MITCHELL.			
GILBERT MORRIS.			
CYRUS WHITE.		×	
BLACKBIRD SHERIDAN.		×	
MORGAN GRANT.		×	
NUGA-SHINGA.		×	
DAVID MORRIS.			
ALFRED HALLOWELL.		×	
NOAH LA FLESCHE.		×	
GIOKA.		×	
CHARLES ROBINSON.		×	
LONE BUFFALOE.		×	
GENE WALKER.		×	
ARTHUR MITCHELL.			
NE-UGA-SHUDS.		×	
ALFRED HALLOWELL.		×	
PHILIP STABLER.			
JAMES HAMILTON.			
NOAH LA FLESCHE.		×	
GIOKA.		×	

	CHARLES ROBINSON.	X
	RICHARD HASTINGS.	X
	INA-HAG-WA-THAS.	X
	INA-STINGA.	X
	TA-HA-SHINGA.	X
51	GEORGE MILLER.	
	LITTLE SOLDIER.	X
	DANIEL WEBSTER.	
	AMOS WALKER.	X
	OU-NA-MA-THE.	
	HENRY BLACKBIRD.	X
	AH-THU-HAGA-MATHE.	X
	DANIEL GRANT.	
	CHARLES MITCHELL.	X
	DANIEL HEWETT.	
	WALTER MORRIS.	X
	PHILIP WALKER.	X
	UTON HENDERSON.	X"

Department of the Interior.

Washington.

June 25, 1909.

9 Omaha Indians.—Residue of Tribal Lands.

The Commissioner of Indian Affairs.

SIR:

The Department has considered your letter of June 3, 1909, requesting reference to the Assistant Attorney-General Interior Department, of questions concerning disposal of the residue lands of the Omaha Indians.

Seventy-eight Omaha Indians request reservation for agency use of the SE. $\frac{1}{4}$, NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 25, T. 25, N. R. 9 E. 6th P. M. except a four rods wide strip on the north side of the first described tract. The two tracts proposed to be reserved are about forty-nine acres.

There have heretofore been reserved for agency purposes the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 24, NW. $\frac{1}{4}$ Sec. 25, and E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 25, all T. 25, N., R. 9 E., out of which the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ (ten acres), Sec. 24, was excepted, and there was temporarily excepted part of the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, one for mission and the other for cemetery purposes, leaving the reservation for strictly agency purposes about and something more than three hundred acres; so that the order asked to be made is a reduction of the existing reservation to forty-nine acres. The Superintendent of the Omaha Indian School May 26, 1909, recommended such reduction and that the land in the reduced agency reservation be reserved

52

for agency purposes so long as may be required for such purposes by the Government.'

The act of August 7, 1882, sections 5 and 6, directed those lands west of a railroad be sold or allotted to tribal members; from those east of that road allotments were to be made to the tribal members in areas stated, and section 8 provided that the residue on completion of the allotments should be patented to the Omaha tribe by a patent declaring the United States would hold the land twenty-five years, and at the end of that time convey it by patent to the tribe in fee, free of incumbrance, discharge of the trust, but with the further provision:

That from the residue of lands thus patented to the tribe in common, allotments shall be made to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions and limitations as are provided in section six of this act touching patents to allottees therein mentioned. But such conditions, restrictions and limitations shall not extend beyond the expiration of the time expressed in the patent herein issued to the tribe in common; And provided further, that these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe.

The individual allotments to tribal members and trust patents, with twenty-five years restriction upon power of alienation, were completed and approved July 11, 1884, and patent for the residue 'lands held in common' was then due. It was not issued and the twenty-five year trust period will expire July 11, 1909.

March 3, 1893 (27 Stat. 612, 630), Congress provided with consent of the tribe for allotments from the residue land—

To each Indian woman and child of said tribe born since allotments of land were made * * * and now living, one-eighth of a section of the residue lands held by that tribe in common, instead of one-sixteenth of a section, as therein provided, and to allot in severalty to each allottee under said act now living, who received only one-sixteenth of a section thereunder, an additional one-sixteenth of a section thereunder, an additional one-sixteenth of a section of such residue lands; Provided, that the allotments so made shall be subject to the same conditions, restrictions and limitations provided for in section six, seven and eight of said act, touching allotments and patents to allottees therein mentioned.

No allotments from the residue lands were made under the provision quoted above from the act of 1882. But under the later act of 1893 allotments were made, so that the residue is now stated by the superintendent December 2, 1908, to be reduced to about 4,500 acres, and there were then living 520 children born after March 3, 1893, or about 8.65 acres each. The land varies from \$7.50 to

over \$600 per acre in value. In consideration of the small area available for each person and the wide variance in value, the superintendent recommended sale of the land and distribution of the proceeds to each of the beneficiaries ratably as being best calculated to carry out the spirit and intent of the act. He also reported that in his opinion a majority of the tribe desired the residue lands disposed of—(1) ten acres to use of the Presbyterian church; (2) seven acres for a cemetery; (3) forty-nine acres for agency use while required; (4) one hundred and sixty-four acres divided into one-acre town lots for sale to tribal members; (5) the remainder sold to tribal members preferably for a trust fund for benefit of children having no allotments. A general council of the tribe, November 10, 1908, was 'almost unanimous' for such propositions, but there was not a full attendance at the council.

February 8, 1909, the Secretary reported these facts to Congress asking legislative action. It was taken into consideration, but the Bill (S. 9305), 60th Congress, 2d Session, failed to pass. Having doubt of the proper course to pursue, you asked instructions.

The act of 1882 intended to deal completely with the Omaha tribal lands, and had its provisions been strictly followed, was adequate to do so. It was no doubt intended that each child born after passage of the act during the full trust period should receive one-sixteenth of a section and that patents should issue at report of the birth or soon thereafter. This is clear from the provision that 'allotments shall be made and patented to each Omaha child' born during the trust period, but that 'the conditions, restrictions and limitations shall not extend beyond the time expressed in the patent—to the tribe in common.' As there were to be like restrictions in these

54 patents to after born children, terminating at the same time as the restrictions in the patent to the tribe, it is clear that the act intended patents should issue before expiration of the trust patent. It involves an absurdity to suppose that after born children were not to receive their allotments until expiration of the trust period, as that construction would require writing into the patent of restrictions already expired, with covenant to hold legal title in trust during a period already expired and immediate issue of a second patent in fee. These considerations show that right to an allotment and to issue of trust patent inured to each after born child at birth.

Had legislation stopped here administration of this trust would be simple. It would be fully administered by issue of patents to each after born child, in order of birth, until all the after born children were allotted or until the land was exhausted.

By the act of 1893 Congress changed the character of the trust. Large part of the trust lands were diverted from the original intended beneficiaries—after born children—to persons in being in 1882; that such of them as had received only a sixteenth section should receive one-eighth of a section. Another part of the trust lands was diverted from children born after March 3, 1893, to double allotments of those then living born after August 7, 1882. As this

was done with full concurrence of the tribe, and rights of children in being were not diminished, it was within plenary power of Congress in administration of the tribal estate. *Lone Wolf vs. Hitchcock* (187 U. S. 553). The character of the trust as to the reserved residue was changed, in that while it was clearly contemplated by the act of 1882 that all children born before July 11, 1909, should have benefit of the residue of tribal land then sufficient on any reasonable probability of future births to give each a one-sixteenth section, the act of 1893 so reduced the residue that such result can not have been regarded as probable and has proved entirely inadequate.

Congress was asked to give further direction, but has failed to act. It is now impossible to carry out the trust created by the act of 1882 by giving all children born after March 3, 1893, the full quantity of a sixteenth section. It is, therefore, in view of the Secretary of the Interior, necessary to hold the residue of tribal lands in trust for children of the tribe born after August 7, 1882, not heretofore allotted, now born, or who may be born to and including July 10, 1909.

You will therefore cause a roll of such persons to be made as soon after July 10, 1909, as it is possible, and a list of the residue land and its value, with view to report of the facts to Congress for its further action.

Any action looking to patenting or disposal of the residue land will be suspended, pending action by Congress, which has plenary power in the matter. In the meantime, the agency reservation, to the extent that is necessary, will continue.

Very respectfully,

FRANK PIERCE,

First Asst. Secy.

Defendant offered in evidence a communication from the Secretary to the Attorney General under date of February 28, 1913, which reads as follows:

"Department of the Interior,

Office of the Secretary,

The Attorney General,

Sir:

I have the honor to acknowledge receipt of your letters of February 10, 1913, E. K. CSE, 165790-1, and February 11, 1913 E. K. CSE, 165790-3, transmitting 18 bills of complaint filed by Indians of the Omaha tribe, wherein the plaintiffs seek to enforce allotments on the Omaha Reservation, Nebraska.

The bills of complaint are identical except as to the name and date of birth of the various plaintiffs, descriptions of land applied for, etc., and for convenient reference, the names of the several plain-

tiffs together with a description of the lands wanted, as shown by the copies of the bills of complaint, are given below:

Glenn Brownrigg, Lot 4, and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 3, T. 24 N. R. 8 E., 6th P. M. and lots 3 and 4, Sec. 8 T. 25 N. R. 8 E. 6th P. M. 87.03 acres.

Russell Chase, E. $\frac{1}{2}$ NE. $\frac{1}{4}$ sec. 26, T. 25 N. R. 9 E. 6th P. M. 80 acres.

Mary Gilpin, W. $\frac{1}{2}$ NE. $\frac{1}{4}$ Sec. 26, T. 25 N. R. 9 E. 6th P. M. 80 acres.

56 Jesse W. Wickersham, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ sec. 29, T. 24 N. R. 9 E. and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 22, T. 24 N. R. 8 E. 80 acres.

Arthur Pilcher, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 7, T. 25 N. R. 9 E. and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ sec. 28 T. 25 N. R. 8 E. 80 acres.

Rose Grant S. 2 SW. $\frac{1}{4}$ sec. 10, T. 25 N. R. 7 E. 80 acres.

Harriet Lamson, Lot 3, Sec. 5 T. 25 N. R. 9 E., and lot 5, Sec. 10, T. 25 N. R. 7 E. lots 3 and 4 Sec. 5 T. 25 N. R. 8 E., 70.94 acres.

Jeanette W. Peabody, lot 7, Sec. 9, T. 25 N., R. 7 E., lot 8, Sec. 10 T. 25 N. R. 7 E. and lot 4 Sec. 5, T. 25 N., R. 9 E., 92.11 acres.

Henry Grant, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 32, T. 26 N., R. 9 E., and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 36, T. 25 N. R. 9 E., 80 acres.

Charlie Fields, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 10, T. 25, N. R. 7, E., and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 32, T. 36 N. R. 9 E., 80 acres.

Henry Clay, lots 5 and 6, Sec. 5 T. 25 N., R. 8 E., 7.48 acres.

Herbert Johnson, W. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 28, T. 24 N., R. 8 E., 80 acres.

Miriam Brownrigg, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 10, T. 25 N., R. 7 E. SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ sec. 8 T. 25 N. R. 9 E. 80 acres.

James Gilpin, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 26, T. 24, N. R. 9 E., 40 acres.

Rose D. Porter, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, sec. 11 T. 25 N., R. 9 E., 80 acres.

Mary Lamson, lots 3 and 4, sec. 20, T. 24, N. R. 8, E. 78.08 acres.

Nellie Webster lots 1 and 2, Sec. 29, T. 24, N., R. 8 E., 78.85 acres.

Alice Springer, E. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 9, T. 24 N., R. 7 E., 80 acres.

Before taking up the legal aspect of these bills, attention is invited to the following facts connected with the lands applied for, as shown by the records of the Indian Office:

The E. $\frac{1}{2}$ NE. $\frac{1}{4}$ Sec. 26, T. 25 N. R. 9 E. asked for by Russell Chase constitutes a part of the Omaha School and administrative reserve, set aside for this purpose under Article 4, of the treaty with the Omaha Indians (14 Stat. L. 667). The disposal of the lands so reserved has been authorized by the Act of May 11, 1912, (37 Stat. L. 111), hereinafter more fully referred to.

57 The NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 22, T. 24 N. R. 8 E., asked for by

Jesse W. Wickersham, is involved in the prior suit by James Gilpin, a member of the Omaha Tribe, vs. United States. See your letter of November 24, 1908, CWR. 143,871, and this Department's response thereto under date of December 18, 1908, at which time the merits of the case were fully considered.

Lot 7, Sec. 9, T. 25 N., R. 7 E., 6th P. M. applied for by Jeanette W. Peabody was involved in the prior suit of John H. Clay, a mem-

ber of the Omaha Tribe vs. United States, wherein the complainant sought to procure an allotment on the Omaha reservation for his deceased child, Amelia Clay, and an additional allotment for his deceased wife, Emily Guitar Clay. See your letter of March 3, 1910, EK, 151591-1, and this Department's response under date of March 28, 1910. Lot 8, Sec. 10, T. 25, N., R. 7 E., also applied for by Jeannette W. Peabody, has previously been allotted to Alice La Flesche Solomon, Omaha allottee No. 21, to whom a trust patent issued under date of May 23, 1900, and a patent in fee for this lot was issued on October 29, 1908. This particular subdivision, therefore, is not available for allotment or disposal at this time.

The NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 32, T. 26, N. R. 9 E., is given in the bills filed by both Henry Grant and Charles Fields, i. e., both complainants are asking in part for the same identical subdivision. The NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 10, T. 25 N., R. 7 E., is involved in the prior suit filed by Herbert Johnson, a member of the Omaha tribe, against the United States, which suit, from the last advice received from your department, was "at issue." See your letter May 11, 1912 (EK CSE 143871-8). In the present suit this plaintiff is asking for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 28, T. 24 N., R. 8 E.

The SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 10, T. 25 N. R. 7 E., asked for by Miriam Brownrigg was also previously applied for by Herbert Johnson in a prior suit. See remarks under Charlie Fields.

The NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 26, T. 24 N., R. 9 E., 40 acres, applied for by James Gilpin is vacant in so far as the records of the Indian Office show, but in a prior suit this same Indian asked for the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 26, T. 25 N., R. 9 E., which suit was the subject of your letter of November 24, 1908, CWR 143871, previously referred to.

The SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 11, T. 25 N., R. 9., applied for by Rose D. Porter has previously been allotted and patented to Gilbert Rush, a member of the Omaha tribe, patent having issued May 23, 1900—25 year trust patent.

58 The E. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 9, T. 24 N., R. 7 E., mentioned in the bill of complaint by Alice Springer, was involved in the prior suit by John H. Clay, which was the subject of your letter of March 3, 1910, and this Department's reply thereto under date of March 28, 1910. Correspondence on file with reference to some of these prior suits indicates that they were dismissed on demurrers filed by the attorneys representing the Government, but the basis of such demurrers is not known to this Department, or the reasons of the Court in sustaining them. These matters are simply mentioned here as they may prove of use in the pending suits.

It may also be pointed out that in the first paragraph of the bill by Henry Clay, it is alleged that the value of the sum of controversy therein exceeds the sum and value of \$3,000, while the land applied for covers lot 5, sec. 5, T. 25 N. R. 8 E., 3.61 acres and lot 6 of the same section, township and range, 3.87 acres, a total area of 7.48 acres. While this Department is not in a position, with the information now before it, to deny the value of these 7.48 acres being in excess of \$3,000, yet, it has not understood that any lands in this reservation could be reasonable valued at so high a figure.

Coming now to the legal questions involved, it will be noted by the bills of complaint that all of the plaintiffs except James Gilpin, were born subsequent to March 3, 1893. As to James Gilpin, it may be said that this Department has heretofore admitted the right of this plaintiff to an allotment of 80 acres on the Omaha reservation, 40 acres of which has heretofore been allotted and patented in his name, the allotment covering the SW. 1/4 SE. 1/4 Sec. 28, T. 24 N., 10 E., and was approved by this Department on July 11, 1884. In its letter of December 18, 1908, responsive to your letter of November 24, 1908, (your file CWR 143871), this department pointed out that, in its opinion, an error had been made in allotments, to members of the Gilpin family, and that lot 4, Sec. 23, T. 24, N. R. 10 E., allotted and patented to Ta-da-wa-ha-ga Gilpin, was intended for James Gilpin, otherwise known as Ga-za-wa-zhu-sha Gilpin. At that time, it was suggested that the Court be asked to declare lot 4, Sec. 23 T. 24 N. R. 10 E., as a part of the allotment of the said James Gilpin.

The Act of August 7, 1882, (22 Stat. L. 341) did authorize allotments in severalty to members of the Omaha tribe, and the issuance to that tribe of a trust patent for the surplus unallotted tribal lands. As alleged in the bill of complaint, such tribal trust patent was not issued, for reasons which this Department is not now able to disclose. On March 3, 1893, further legislation affecting these tribal lands was enacted by the Congress, and will be found in 27 Statutes at Large, Page 630, by which additional allotments were authorized to members of this tribe, occupying a certain status and authorized this Department also to allot in severalty to each child, then living, born to members of said tribe, since the prior allotments were made.

Clearly by the Act of March 3, 1893, *supra*, Congress intended and did provide other disposition of the surplus tribal lands of the Omaha Indians than that found in Sec. 8, of the Act of August 7, 1882, because the act of March 3, 1893, reads, in part:

The Act of Congress approved August seventh, eighteen hundred and eighty-two, entitled 'An Act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for the other purposes,' be, and the same is hereby amended. * * * Under the act of March 3, 1893 allotments to be made from the tribal land were confined to members of the Omaha tribe then living, i. e. in being on March 3, 1893. The bills of complaint in the suits under discussion, with the exception of James Gilpin, all showing that the plaintiffs were born after March 3, 1893, in the opinion of this Department, the plaintiffs, except James Gilpin, are not entitled to allotments on the Omaha reservation under existing laws.

That Congress intended also to provide other disposition of the surplus lands on the Omaha reservation, Nebraska, than that found in Sec. 8 of the Act of August 7, 1882, *supra*, is borne out by the fact that a Bill was introduced in the 60th Congress, 2d Session, providing for a sale of those tribal lands and the distribution of the proceeds per capita. See Senate Bill 9305, 60th Congress, 2d Session, and House Documents 1431 and 1479, same session. This bill failed of enactment, however, but the act of May 27, 1912, (37 Stat.

L. 111), contains the legislation, substantially, as that designated to be provided by Senate 9305, 60th Congress, 2nd Session. The act of May 11, 1912, *supra*, authorizes this Department to sell the unallotted tribal lands within the Omaha reservation and to distribute the proceeds pro-rata among the children belonging to that tribe, living on the date of the passage and approval of the act, who have not received allotments of land under the Acts of August 7, 1882, or March 3, 1893, *supra*. This, of itself, is a recognition by the Congress that the equitable title to these lands is in the Omaha tribe, and that in making a division thereof it should be distributed pro rata to those members of the tribe who have not heretofore received the benefit of an allotment in severalty.

In this connection, it may be pointed out that the surplus tribal lands within this reservation approximate 4500 acres, while the number of unallotted members of the tribe now living will approximate 500. Even though the Court should hold that Sec. 8 of the Act of August 7, 1882, is operative as to these tribal lands, yet there is not sufficient land to give in allotment to the unallotted members the quantity of land specified in that act. If a pro-rata division were to be made, it would be slightly in excess of 8 acres to each unallotted Indian. Owing to local conditions, one given tract of 8 acres, approximately, would prove far more valuable than another tract of similar area in the same or an adjacent locality. This would result in injustice being done to some members of the tribe, who, by obtaining the more valuable tracts, would have an advantage over the less fortunate. Evidently, therefore, the only equitable distribution that can be made, is by a sale and distribution of the proceeds per capita, which will treat all unallotted members of this tribe alike, as the Act of May 11, 1912, *supra*, contemplates.

Granting for the sake of argument only that the plaintiffs in these bills of complaint are entitled to allotments on the Omaha reservation under the act of 1882, it can readily be seen that there is surplus tribal land sufficient only to allot approximately 56 Indians, if given 80 acres each, or 112 Indians if given 40 acres each. It would seem, however, that if the Court recognizes the right of one of these plaintiffs born since March 3, 1893, to an allotment, the same right should be recognized as existing in all of the unallotted children of this tribe born since that date. Being impossible, therefore, to allot all of these children, in what other manner can an equitable distribution of this tribal asset be made than by sale and a division of the money, which can be distributed pro rata?

This difficulty was explained to the Congress when legislation, which resulted in the act of May 11, 1912, *supra*, was pending, as the following extract from Senate report 459, 62nd Congress, 2nd Session, will show:

Section 8 of the act of August 7, 1882, *supra*, provided that, from the residue of lands to be patented to the tribe in common, allotments should be made and patented to each Omaha child born prior to the expiration of the time during which it was provided that the tribal lands should be held in trust, (i. e., prior to July 10, 1909, on the constructive hypothesis herein outlined),

the individual patents to override the patent to the tribe in common and the lands so patented to the children to be segregated from the tribal lands. It is worthy of note also that the trust period on the proposed allotments to children was to expire, under the terms of this section, simultaneously with the expiration of the trust period on the tribal lands.

No allotments to children have been made under this section. The only allotments made from the residue of lands after the allotments of 1884 were made under the terms of the act of March 3, 1893, (27 Stat. L. 612, 630), which was amendatory in that it gave larger areas to children allotted under the former act, and provided for allotments to all women and children in being on March 3, 1893. The later act, however, did not repeal the former, so that there can be no doubt that the children born since March 3, 1893, have been born into a right to an allotment of 40 acres each under the provisions of the act of August 7, 1882, *supra*, so long as any is left of the tribal land.

The difficulty in carrying out the intent of this act at this time arises from the fact that there are now living 520 children of the tribe who, having been born since March 3, 1893, have received no allotments and there is only about 4,500 acres of unallotted land, so that only 112 allotments of 40 acres each could be made to the 112 oldest unallotted children, leaving 408 children for whom no provision would be made. The prospect of such a disposition has aroused intense opposition among the parents of the 408 children who would thus receive nothing. Moreover, the unallotted land varies greatly in character and value, so that it was impossible equitably to divide it.

To pass a measure providing for the equal distribution of the tribal lands among all the living children would be open to serious objection, because this would give each child only about 8.6 acres, of unequal value, a quantity too small to be either cultivated or leased to advantage.

It would seem wiser to provide legislation designed to carry out the spirit of the act of August 7, 1882, the neglect to comply with the letter of it being a matter not susceptible of explanation at this time. The value in the open market of the tribal lands is 62 variously estimated at \$100,000 to \$200,000. At the lower — — figure the sale of the lands and an equal distribution of the funds so arising among all the children would give each child about \$190.

While no patent, either trust or fee, was issued to the Omaha tribe for the surplus lands, as contemplated by the Act of August 7, 1882, *supra*, yet the plaintiffs claim, in effect, that the fee to these tribal lands is in the tribe at large, as the bills of complaint will show. If this is true, then the tribe at large should have some right to say what disposition is to be made of this tribal asset, and a majority of the tribe has heretofore expressed its wishes in no uncertain terms regarding this matter, the files of the Indian Office showing the receipt under date of November 27, 1909, of a communication from the Superintendent in charge of the Omaha Indian School, wherein the following appears:

In reply to your letter of November 17 with reference to making

an allotment from unappropriated tribal lands to the heirs of Rachel Miller, deceased, as recommended by Miss Fletcher, formerly special allotting agent on the Omaha reservation, I have the honor to report that on Friday, November 26, a general council of the Omaha tribe was held in the council room of the Omaha agency and this matter was brought to their attention and a full expression of their views given.

By a unanimous vote of the Indians present it was decided that they did not want this allotment made. A report was kept of each vote, each Indian coming up to the desk and voting for himself.

They expressed a strong desire to have legislation passed to have these tribal lands sold and the proceeds distributed to the unallotted living children and in furtherance of that end they decided to send delegates to Washington in January to be paid out of their own pockets for the purpose of lobbying through such legislation.

They requested me to request the Department to permit no further allotments to be made or exchanges affecting tribal lands in their present status as they were all anxious to have the tribal lands as they now exist sold and the proceeds divided equally among the living children who have received no allotments. This request seems reasonable and I recommend that it be followed as nearly as possible.

63 As previously stated, it would seem that if as a matter of law one of these children, born since March 3, 1893, is entitled to an allotment under the provisions of the Act of August 7, 1882, [*spura*], then all of the unallotted children belonging to this tribe are so entitled. Being a physical impossibility to allot all of these children owing to an insufficiency of land, the spirit and intent of the Act of 1882, *supra*, can best be carried out as contemplated by the Act of May 11, 1912, (37 Stat. L. 111), by a sale of the surplus tribal lands and a distribution pro rata of the proceeds derived therefrom to the unallotted members of this tribe in being on the date of the approval of that act.

Referring to the last paragraph of page 2 of this letter, it is also pointed out that the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Section 26, Township 25, West, Range 9 East, applied for by Mary Gilpin, has previously been allotted and patented to Wa-taw-we Harlan, Omaha allottee No. 808, trust patent having issued November 25, 1904.

As requested the bills of complaint are returned herewith, together with an extra copy of this letter.

Respectfully,

LOUIS C. LAYLIN,
Asst. Secretary.

The defendants offered in evidence Exhibit 31 relating to certain proceedings in the Congress of the United States, the only material parts of which are as follows:

"The White House, May 6, 1912.

Unallotted Land, Omaha Indian Reservation, State of Nebraska.

The next business on the Calendar for Unanimous Consent was the bill (S.5060) to provide for the disposal of the unallotted land on the Omaha Indian Reservation in the State of Nebraska.

The Clerk read as follows:

An Act (S.5060) to provide for the disposal of the unallotted land on the Omaha Indian Reservation in the State of Nebraska:

64 Be it enacted, etc., That the Secretary of the Interior be, and he is hereby authorized to cause to be surveyed, if necessary, and appraised, in manner hereinafter set forth, in tracts of 40 acres each, and, after such survey and appraisal, to sell and convey, in quantities not to exceed 160 acres to any one purchaser, all the unallotted lands on the Omaha Indian Reservation, in the State of Nebraska, except such tracts as are hereinafter specifically reserved; Provided, that the said land shall be sold to the highest bidder under such regulations as the Secretary of the Interior may prescribe, but no part of said land shall be sold at less than the appraised value thereof; And provided further that prior to such appraisal and sale any member of the Omaha Tribe whose allotment is subject to erosion by the Missouri River shall be permitted to relinquish such allotment and select lieu lands of equal area from the unallotted lands, the land so relinquished to become a part of the unallotted tribal lands and subject to appraisal and sale under the terms of this Act.

Sec. 2. That the Secretary of the Interior is hereby directed to reserve from sale, under the terms of this act, the following tracts of land for the purposes designated; Forty-nine acres of the land now used for agency purposes to be reserved for agency and school purposes for so long as the need thereof exists; 10 acres to be selected by the tribe for use as a tribal cemetery; 10 acres of the land now reserved for the use of the Presbyterian Church to be selected by the officials of said church for the use of the church so long as needed for religious or educational purposes; 2 acres of the land in which is standing what is known as the old Presbyterian mission building, and the Secretary of the Interior is hereby authorized to cause a patent in fee simple to issue therefor in the name of the State Historical Society of Nebraska; Provided, that of the land now reserved for agency purposes the Secretary of the Interior is directed to reserve and set aside for town-site purposes 164 acres other than the 49 acres hereinbefore reserved, and shall cause the same to be surveyed and platted into town lots, streets, alleys, and parks, the lots to be appraised and sold under the terms of this act, but no bid shall be received therefor except from members of the tribe and the streets, alleys and parks are hereby dedicated to public use.

Sec. 3. That the appraisal directed by this act shall be made by three competent commissioners to be appointed by the Secretary

of the Interior, after the completion of the surveys herein directed and authorized, one of whom shall be a resident citizen of the State of Nebraska, one an employee of the Indian Bureau, and one
 65 holding tribal relations with the Omaha Indians; said commission to be paid a salary of not to exceed \$5 per day each while actually employed in the inspection and appraisal of said land, such appraisalment to be completed within such a period after the date of the organization of said commission as the Secretary of the Interior shall designate.

Sec. 4. That the proceeds of such sale, after paying all the expenses incident to and necessary for carrying out the provisions of this act, and after reimbursing the general trust fund of the tribe for any assessment paid therefrom for protecting the unallotted tribal lands from overflow, shall be divided pro rata among the children of the Omaha Tribe living on the date of the passage and approval of this act who have not received allotments of land under the act of August 7, 1882 (22 U. S. Stat. L. 341), and March 3, 1893, (23 U. S. Stat. L. 630), and shall be expended for the benefit of said Indians when and in such manner as in the opinion of the Secretary of the Interior shall be to their best interests, and pending such expenditure by the said Secretary the sums due the respective Indians shall be placed to the credit of the said Indians in the Treasury of the United States, and shall bear interest at the rate of 5 per cent per annum, but in the event of the death of any such Indian while there remains in the Treasury to his credit any part of the sum so deposited the said sum shall be paid at once to his heirs, who shall be determined by the Secretary of the Interior in accordance with the laws of descent in force in the State of Nebraska, and the action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

Sec. 5. That for the purpose of carrying out the provisions of this Act there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$3,000, or so much thereof as may be necessary, to be reimbursable out of the funds arising from the sale of said lands.

Sec. 6. That all acts and parts of acts not consistent with the provisions of this act are hereby repealed.

The Speaker: Is there objection?

Mr. Mann: Mr. Speaker, reserving the right to object, I notice in the report of the department in reporting upon this bill it states as follows:

66 Section 4 of the bill provides that the proceeds derived from the sale of the tribal lands shall be deposited in the Treasury of the United States to the individual credit of the unallotted children living at the date of the passage of the act to draw interest at the rate of 5 per cent per annum, each Indian to be paid his share with accrued interest when he reaches the age of 25 years.

That seems to have been changed in the bill. Does not the bill now provide:

But in the event of the death of any such Indian while there remains in the Treasury to his credit any part of the sum so deposited, such sum shall be paid at once to his heirs, who shall be determined by the Secretary of the Interior.

And so forth.

What would happen? Suppose an Indian died with a sum to his credit in the Treasury and leaving small children who are incompetent to take care of themselves. They get the money, do they not, or their guardian, under this bill?

Mr. Stephens of Nebraska: I should think so. That is what the bill says. Would there be serious objection, do you think, for the Secretary in his discretion, to pay according to the competency of the heirs?

Mr. Mann: Well, it says on page 4, line 22—of course this is after the money goes into the Treasury to the credit of the Indian:

But in the event of the death of any such Indian while there remains in the Treasury to his credit any part of the sum so deposited, such sum shall be paid at once to his heirs, who shall be determined by the Secretary of the Interior.

Mr. Stephens of Texas: I will call the attention of the gentlemen to the first line on page 5.

Mr. Mann: Yes; that is where it says in accordance with the laws of descent.

Mr. Stephens of Texas (reading):

The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian as provided herein shall in all respects be conclusive and final.

Mr. Mann: That only allows the Secretary to determine the heirs, but it provides the money shall be paid at once to them.

67 Mr. Stephens of Texas: After the Indian is dead the money is paid to the Treasury, and the Secretary of the Interior has to determine, under the laws of Nebraska, who these heirs are in accordance with the laws of descent in force in the State of Nebraska.

Mr. Burke of South Dakota: My understanding of it is that in case of the death of the Indian that the money shall be paid to his heirs, as the bill states. Of course, it would have to be paid to his heirs, I think that is the intention.

Mr. Mann: I have no doubt that is the intention of the bill. The Secretary, however, has recommended that he be allowed to pay the money to the Indians when they reach the age of 25 years.

"Omaha Indian Reservation Lands in Nebraska.

Mr. Brown: I ask unanimous consent for the present consideration of the bill (S. 5060) to provide for the disposal of the unallotted land on the Omaha Indian Reservation in the State of Nebraska.

There being no objection, the Senate, as in Committee of the whole, proceeded to consider the bill, which had been reported from the Committee on Indian Affairs with amendments. The first amendment was in Section 2, page 2, line 18, before the word 'acres,' to strike out 'seven' and insert 'ten,' so as to read:

Sec. 2. That the Secretary of the Interior is hereby directed to reserve from sale, under the terms of this Act, the following tracts of land for the purposes designated: Forty-nine acres of the land now used for agency purposes to be reserved for agency and school purposes for so long as the need thereof exists; 10 acres to be selected by the tribe for use as a tribal cemetery; 10 acres of the land now reserved for the use of the Presbyterian Church to be selected by the officials of said church for the use of the church so long as needed for religious or educational purposes; 2 acres of the land on which is standing what is known as the old Presbyterian mission building, and the Secretary of the Interior is hereby authorized to cause a patent in fee simple to issue therefor in the name of the State Historical Society of Nebraska.

The amendment was agreed to.

The next amendment was, in Section 4, page 4, line 1, after the word 'act' to insert 'and after reimbursing the general trust fund of the tribe for any assessment paid therefrom for protecting the unallotted tribal lands from overflow;' in line 8, after the word 'page' to strike out 'one' and insert 'three'; and in line 11, after the word 'he', to strike out 'placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of 5 per cent per annum, until such time as the individual Indians shall have reached the age of 25 years, when the share to the credit of each Indian, with accrued interest, shall be paid to him upon application therefor through the Secretary of the Interior; but in the event of the death of such Indian prior to reaching the age of 25 years, his share shall be paid at once to his heirs under the laws of descent in force in the State of Nebraska'; and insert 'expended for the benefit of said Indians when and in such manner as in the opinion of the Secretary of the Interior shall be to their best interests, and pending such expenditure by the said Secretary the sums due the respective Indians shall be placed to the credit of the said Indians in the Treasury of the United States, and shall bear interest at the rate of 5 per cent per annum, but in the event of the death of any such Indian while there remains in the Treasury to his credit any part of the sum so deposited the said sum shall be paid at once to his heirs, who shall be determined by the Secretary of the Interior in accordance with the laws of descent in force in the State of Nebraska, and the action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final,' so as to make the section read:

Sec. 4. That the proceeds of such sale, after paying all the expenses incident to and necessary for carrying out the provisions of this act, and after reimbursing the general trust fund of the Tribe for

any assessment paid therefrom for protecting the unallotted tribal lands from overflow, shall be divided pro rata among the children of the Omaha tribe living on the date of the passage and approval of this act who have not received allotments of land under the acts of August 7, 1882 (22 U. S. Stat. L. p. 341), and March 3, 1893, (23 U. S. Stat. L. p. 630), and shall be expended for the benefit of said Indians when and in such manner as in the opinion of the Secretary of the Interior shall be to their best interests, and pending such expenditure by the said Secretary the sums due the respective Indians shall be placed to the credit of the said Indians in the Treasury of the United States, and shall bear interest at the rate of 5 per cent per annum, but in the event of the death of any such Indian while there remains in the Treasury to his credit any part of the sum so deposited the said sum shall be paid at once to his heirs, who shall be determined by the Secretary of the Interior in accordance with the laws of descent in force in the state of Nebraska, and the action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

The amendments were agreed to.

The bill was reported to the Senate as amended, and the amendments were concurred in.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

Mr. Brown: I ask that the report of the committee accompanying the bill be printed in the Record.

The Vice-President: Without objection, it is so ordered.

The report (No. 459) submitted by Mr. Brown, March 8, 1912, is as follows:

Sale and Disposition of Lands in Omaha Indian Reservation, in Nebraska.

Mr. Brown, from the Committee on Indian Affairs, submitted the following report to accompany S. 6050:

The Committee on Indian Affairs to which was referred the bill (S. 5060) to provide for the disposal of the unallotted lands on the Omaha Indian Reservation in the State of Nebraska, having had the same under consideration beg leave to report that the bill do pass with the following amendments:

Page 2, line 15, strike out the word 'seven' and insert in lieu thereof the word 'ten'.

Page 3, line 23, after the word 'act' insert the following:

'And after reimbursing the general trust fund of the tribe for any assessment paid therefrom for protecting the unallotted tribal lands from overflow.'

Page 4, line 3, strike out the word 'one' and insert in lieu thereof the word 'three'.

Page 4, line 6, after the word 'be' strike out the remainder of said

line and all of lines 7 to 15, inclusive, and insert in lieu thereof the following:

'Expended for the benefit of said Indians when and in such manner as in the opinion of the Secretary of the Interior shall be to their best interests, and pending such expenditure by the said
70 Secretary the sums due the respective Indians shall be placed to the credit of the said Indians in the Treasury of the United States and shall bear interest at the rate of 5 per cent per annum; but in the event of the death of any such Indian while there remains in the Treasury to his credit any part of the sum so deposited the said sum shall be paid at once to his heirs, who shall be determined by the Secretary of the Interior, in accordance with the laws of descent in force in the State of Nebraska and the action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.'

Your committee submits and makes a part of this report two letters from the Department of the Interior on the subject of the proposed legislation:

Department of the Interior,

Washington, February 11, 1912.

Hon. Robert J. Gamble,
Chairman Committee on Indian Affairs,
United States Senate.

SIR:

I have the honor to acknowledge the receipt, by your reference of February 6, 1912, for consideration and report of a copy of Senate bill 5060, Sixty-second Congress, second session, providing for the sale of the tribal lands of the Omaha Indian Reservation in Nebraska.

This department, on January 28, 1910, submitted to the Congress drafts of a bill authorizing the sale of the Omaha tribal lands, and in its letters accompanying said drafts set forth fully the facts relating thereto. See House Document No. 630, Sixty-first Congress, second session.

The Indians have expressed a desire to have 10 acres set aside for a tribal cemetery. It is respectfully recommended, therefore, that the word 'seven' in section 2, line 15, page 2, be stricken out and the word 'ten' be inserted in lieu thereof.

The word 'one' in section 4, line 3, page 4, should be stricken out and the word 'three' inserted in lieu thereof.

The act of February 18, 1909, (35 Stat. L. 628) authorized the payment of any assessments which may be made by any
71 drainage district in the state of Nebraska on the tribal lands of the Omaha and Winnebago Indians, to protect such lands from overflow, from the tribal funds remaining to the credit of these Indians.

The estimated cost of drainage to protect the tribal lands of the Omaha tribe is approximately \$300. The lands subject to overflow will be greatly enhanced in value by the drainage provided for in the

act of February 18, 1909, [separa], and it is but just that the cost of draining these tribal lands should be paid from the proceeds derived from their sale. It is believed that provision should be made in the bill of reimbursing the tribal funds for the cost of draining the lands to be sold from the proceeds of the sale. This can be done by inserting after the word 'act' in section 4, line 23, page 3, the following:

'And after reimbursing the general trust fund of the tribe for any assessment paid therefrom for protecting the unallotted tribal lands from overflow.'

Section 4 of the bill provides that the proceeds derived from the sale of the tribal lands shall be deposited in the Treasury of the United States to the individual credit of the unallotted children living at the date of the passage of the act, to draw interest at the rate of 5 per cent per annum, each Indian to be paid his share with accrued interest when he reaches the age of 25 years.

The Department is of the opinion that authority should be given the Secretary of the Interior to expend the share of Individual Indians prior to the time they reach the age of 25 years, when, in his opinion, it will be to his advantage. It is not deemed advisable to have money deposited in the Treasury to the credit of these individual Indians which cannot be used to provide for their education or to relieve sickness and distress.

It is respectfully recommended therefore that section 4 be further amended by striking out all that part thereof after the word 'be' in line 6, page 4, and inserting in lieu thereof the following:

'Expended for the benefit of said Indians when and in such manner as in the opinion of the Secretary of the Interior shall be to their best interest, and pending such expenditure by the said Secretary the sums due the respective Indians shall be placed to the credit of said Indians in the Treasury of the United States, and shall
72 bear interest at the rate of 5 per cent per annum, but in the event of the death of any such Indian while there remains in the Treasury to his credit any part of the sum so deposited the said sum shall be paid at once to his heirs, who shall be determined by the Secretary of the Interior, in accordance with the laws of descent in force in the State of Nebraska, and the action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.'

If amended as suggested herein, the Department will be glad to see the enactment of Senate bill 5060, Sixty-second Congress, second session.

Respectfully,

SAMUEL ADAMS,
Acting Secretary.

Department of the Interior,

Washington, February 8, 1909.

SIR:

By direction of the President, I enclose a draft of a bill, the enactment of which into law at this session of Congress I consider extremely urgent, for reasons which I shall set out. The proposed measure provides for the disposal of all the unallotted land on the Omaha Indian Reservation in the state of Nebraska.

Allotments on the Omaha Indian Reservation were originally made in accordance with the provisions of the act of August 7, 1882 (22 Stat. L. 341). Allotments under this act to 954 members of the tribe were approved by the department on July 11, 1884, and the trust period for such allotments will expire on July 10, 1909.

Section 8 of the same act provides that the residue of lands, after all allotments had been made' * * * shall be patented to the said Omaha Tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of 25 years in trust for the sole use and benefit of the said Omaha Tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians in fee discharged of said trust and free of all charges or encumbrance whatsoever.

73 For reasons which the present administration of the department of the Indian office is unable to supply, no patent to the tribal lands was issued in accordance with the direction of the section quoted. It is easy to conceive, however, that a court of law might hold that the act was mandatory, and required the issuance of a trust patent for the tribal lands, and that, since this ought to have been done, a constructive trust period went into effect with regard to the tribal lands from the date of the completion of allotments in severalty on July 11, 1884, and would therefore expire on July 10, 1909.

In view of this possible and very probable interpretation of the act of August 7, 1882, that a constructive trust period is now in effect, which will expire on July 10, 1909, it is manifest:

1. That if no provision be made to meet the condition it needs only conflicting interests in the disposition of the unallotted lands to bring about much expensive and vexatious litigation and serious embarrassment to the administration of the affairs of these Indians.

2. That any legislation designed to meet the emergency if such exists, must be passed at this session of Congress in order to be of any avail.

There are conflicting interests in the disposition of this unallotted land, which arise from the following conditions:

Section 8 of the act of August 7, 1882, *supra*, provided that, from the residue of lands to be patented to the tribe in common, allotments should be made and patented to each Omaha child

born prior to the expiration of the time during which it was provided that the tribal lands should be held in trust (i. e. prior to July 10, 1909, on the constructive hypothesis herein outlined), the individual patents to override the patent to the tribe in common, and the lands so patented to the children to be segregated from the tribal lands. It is worthy of note, also, that the first period of the proposed allotments to children was to expire, under the terms of this section, simultaneously with the expiration of the trust period on the tribal lands.

No allotments to children have been made under this section. The only allotments made from the residue of lands after the allotments of 1884 were made under the terms of the act of March 3, 1893, (27 Stat. L. 612, 630), which was amendatory in 74 that it gave larger areas to children allotted under the former act, and provided for allotments for all women and children in being on March 3, 1893. The later act, however, did not repeal the former, so that there can be no doubt but that the children born since March 3, 1893, have been born into a right to an allotment of 40 acres each under the provisions of the act of August 7, 1882, *supra*, so long as any is left of the tribal land.

The difficulty in carrying out the intent of this act at this time arises from the fact that there are now living 520 children of the tribe, who, having been born since March 3, 1893, have received no allotments and there is only about 4,500 acres of unallotted land, so that only 112 allotments of 40 acres each could be made to the 112 eldest unallotted children, leaving 408 children for whom no provision would be made. The prospect of such a disposition has aroused intense opposition among the parents of the 408 children who would thus receive nothing. Moreover, the unallotted land varies greatly in character and value, so that it was impossible equitably to divide it.

To pass a measure providing for the equal distribution of the tribal lands among all the living children would be open to serious objection, because this would give each child only about 8.6 acres, of unequal value—a quantity too small to be either cultivated or leased to advantage.

It would seem wiser to provide legislation designed to carry out the spirit of the act of August 7, 1882, the neglect to comply with the letter of it being a matter not susceptible of explanation at this time. The value in the open market of the tribal lands is variously estimated at \$100,000 to \$200,000. At the lower figure the sale of the lands and an equal distribution of the funds so arising among all the children would give each child about \$190. The oldest child who could become a beneficiary under such a plan would be about 15 years of age when title passed to him for his share of \$190. If this sum were placed to his credit in the Treasury at 5 per cent interest per annum until he was 25 years of age, the amount then due him would be \$285. The younger the child at the date of the passage and approval of such act the greater the sum which would be his on reaching the age of 25 years.

Such is the purport of the accompanying bill, which is believed

not only to furnish the best solution of the problem but to meet the wishes of the majority of the tribe as expressed in open council, and in communication to the Indian Office.

The bill contains certain reservations essential to the welfare of the tribe; provides for an Indian town near the present agency, which is a cherished dream of the Omahas; and gives the Nebraska Historical Society the old Presbyterian mission, which it is their desire to preserve as a landmark; and I strongly urge its enactment into law, and again call your attention to the fact that it is necessary that such an enactment be had at this session if at all.

Very respectfully,

JAMES RUDOLPH GARFIELD,

Secretary.

The Speaker of the House of Representatives.

An Act to Provide for the Disposal of the Unallotted Land on the Omaha Indian Reservation in the State of Nebraska.

Be it enacted, etc., that the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and appraised, in manner hereinafter set forth, in tracts of 40 acres each; and, after such survey and appraisement, to sell and convey, in quantities not to exceed 160 acres to any one purchaser, all the unallotted lands on the Omaha Indian Reservation in the State of Nebraska, except such tracts as are hereinafter specifically reserved; Provided, that the said land be sold to the highest bidder under such regulations as the Secretary of the Interior may prescribe, but no part of said land shall be sold at less than the appraised value thereof; And provided further, that prior to such appraisement and sale, any member of the Omaha Tribe whose allotment is subject to erosion by the Missouri River, shall be permitted to relinquish such allotment and select [—] lieu lands of equal area from the unallotted lands, the land so relinquished to become a part of the unallotted tribal lands and subject to appraisement and sale under the terms of this act.

Sec. 2. That the Secretary of the Interior is hereby directed to reserve from sale under the terms of this act the following tracts of land for the purposes designated: Forty-nine acres of land now used for agency purposes, to be reserved for agency and school purposes for so long as the need therefor exists; 7 acres, to be selected by the tribe, for use as a tribal cemetery; 10 acres of the land now reserved for the use of the Presbyterian Church, to be selected by the officials of said church, for the use of the church so long as needed for religious or educational purposes; 2 acres of the land on which is standing what is known as the old Presbyterian mission building, and the Secretary of the Interior is hereby authorized to cause a patent in fee simple to issue therefor in the name of the State Historical Society of Nebraska; Provided, that of the land now reserved for agency purposes the Secretary of the Interior is directed to reserve and set aside for townsite purposes

164 acres, other than the 49 acres hereinbefore reserved, and shall cause the same to be surveyed and platted into town lots, streets, alleys, and parks, the lots to be appraised and sold under the terms of this act, but no bid shall be received therefor except from members of the tribe, and the streets, alleys, and parks are hereby dedicated to the public use.

Sec. 3. That the appraisement directed by this act shall be made by three competent commissioners to be appointed by the Secretary of the Interior, after the completion of the surveys herein directed and authorized, one of whom shall be a resident citizen of the State of Nebraska, one an employee of the Indian Bureau, and one holding tribal relations with the Omaha Indians, said commission to be paid a salary of not to exceed \$5 per day each while actually employed in the inspection and appraisal of said land, such appraisement to be completed within such a period after the date of the organization of said commission as the Secretary of the Interior shall designate.

Sec. 4. That the proceeds of such sale, after paying all the expenses incident and necessary for carrying out the provisions of this Act, shall be divided pro rata among the children of the Omaha Tribe living on the date of the passage and approval of this act who have not received allotments of land under the acts of August 7, 1882 (22 U. S. Stat. L. 141), and March 3, 1893, (23 U. S. Stat. L. 630), and shall be placed to the credit of said Indians in the Treasury of the United States, and shall bear interest at the rate of 5 per cent per annum until such time as the individual Indians shall have reached the age of 25 years, when the share to the credit of each Indian, with accrued interest, shall be paid to him upon application therefor through the Secretary of the Interior; but in the event of the death of such Indian, prior to reaching the age of 25 years, his share shall be paid at once to his heirs under the laws of descent in force in the state of Nebraska.

77 Sec. 5. That for the purpose of carrying out the provisions of this act there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$3,000, or so much thereof as may be necessary, to be reimbursable out of the funds arising from the sale of said lands.

Sec. 6. All acts and parts of act not consistent with the provisions of this act are hereby repealed."

The defendants offered in evidence a duly certified copy of a docket as Exhibit 32, which reads as follows:

“Department of the Interior,
United States Indian Service,
Omaha Agency, Macy, Nebraska.

Nov. 27, 1909.

Commissioner of Indian Affairs,
Washington, D. C.

SIR:

In reply to your letter of November 17 with reference to making an allotment from unallotted tribal lands to the heirs of Rachel Miller, deceased, as recommended by Miss Fletcher, formerly special allotting agent on the Omaha reservation.

I have the honor to report that on Friday, Nov. 26, a general council of the Omaha tribe was held in the council room at the Omaha agency and this matter was brought to their attention and a full expression of their views given.

By a unanimous vote of the Indians present it was decided that they did not want this allotment made. A report was kept of each vote each Indian coming up to the desk and voting for himself.

A considerable discussion was entered into by the Indians, the substance of which was about as follows:

While Miss Fletcher was making allotments here they say that she declined to make an allotment in the name of any Indian who had died between the time of the passage of the Act of August 7, 1882, and the time in which she was ready to allot them. That she did not allot any one without knowing them to be living at the time of making the allotments. There were old gray-headed men who got up and stated that they had brothers, sisters, or children, who

died after the Act of Aug. 7, 1882, and before Miss Fletcher
78 could reach them to make an allotment and that there was no allotment made for them. That if this allotment was made to the heirs of Rachel Miller that there should also be allotments made to these other parties and that to do so would result in endless complications.

They expressed a strong desire to have legislation passed to have these tribal lands sold and the proceeds distributed to the unallotted living children and in furtherance of that end have decided to send delegates to Washington in January to be paid out of their own pockets for the purpose of lobbying through such legislation.

They requested me to request the Department to permit no further allotments to be made or exchanges affecting tribal lands in their present status as they were all anxious to have the tribal lands as they now exist sold and the proceeds divided equally among the living children who have received no allotments. This request seems reasonable and I recommend that it be followed as nearly as possible.

Particular inquiry was made as to whether the matter of the allotment to the heirs of Rachel Miller had ever been brought to the attention of any number of Omahas at any previous time, at a meeting

or otherwise. Of the forty odd men present none had heard of the matter until this meeting.

From the statements of the old Indians it seems to me a well established fact that while George Miller had two wives at that time, Rachel Miller being the first wife and Mary Saunsoci the second, that Rachel Miller was recognized as his legal wife for the reason that he, George Miller, was allotted 160 acres as the head of the family, Rachel Miller being recognized as his wife.

It seems to me that the point taken by the Indians namely, that this precedent would open up the gates to a flood of applications for allotments for deceased relatives who died after August 7, 1882, and before Miss Fletcher could allot them, is well taken and I suggest that no further action be taken upon this case.

Very respectfully,

A. G. POLLOCK,
Supt. & S. D. A.

V. V.

79

Petition.

We the undersigned, members of the Omaha tribe, residing on the Omaha Reservation, Nebraska, hereby petition the Honorable Secretary of the Interior and the Honorable Commissioner of Indian Affairs that the bill presented to Congress for the sale of the Omaha tribal land remaining unallotted, to be re-presented recommending the passage of same.

Witness to marks and interpreter

LEVI LEVERING.

1. THOMAS McCaULEY.
2. DANIEL WEBSTER.
3. HARRY LYON.
4. HARVEY WARNER.
5. NOAH LA FLESCHE.
6. JACOB PENN.
7. NICHOLAS LYON.
8. HORACE WALKER.
9. ARTHUR RAMSEY, his mark.
10. DAVID WELLS.
11. THOMAS REESE.
12. GEORGE RAMSEY.
13. THOMAS P. WEBSTER.
14. FRANK LEAMING.
15. JOHN LYON.
16. HARRY BAXTER.
17. C. LA FLESCHE.
18. JAS. BLACKBIRD.
19. THOMAS WOLFE, his mark.
20. ALFRED McCaULEY, his mark.

21. JAMES GRANT.
22. ELLIS BLACKBIRD, his mark.
23. GEORGE FIELDS.
24. LUTHER WOLF.
25. AMOS WALKER, his mark.
26. POLLOCK WELLS.
27. HENRY HENDERSON.
28. ARTHUR DAK.
29. DAVE REESE.
30. GEORGE NORRIS.
31. WILLIAM FROST, his mark.
32. OLIVER WOLF.
33. SAMUEL GRANT.
34. HARRY BLACKBIRD.
35. LEVI LEVERING.
36. LOUIS DICK.
37. CHARLES MORRIS.
38. A. P. MORGAN.
39. HARRY J. MORRIS.
40. EDWARD WOLF.
41. JOHN BROWN.
42. HARRY SOLOMON.
43. EDWARD MORRIS.
45. JAMES STABLER.
46. JOHN J. LYON.
47. STAFFORD WOODHULL.
48. JOSEPH MERRICK, his mark.
58. JOHN MORRIS, JR.
59. HARRY WALKER.
60. EDWARD ESAU.
61. JAMES WOOD.
62. DON LYONS.
63. CHAS. GUITAR.
64. ROBERT SMITH.
65. JAS. FREMONT.
66. JESSE MORRIS, his mark.
67. DAVID PORTER, his mark.
68. JAMES W. PARKER.
69. JOE DICK.
70. LITTLE CHIEF, his mark.
49. DAVID CAUL.
50. CHARLES PEABODY.
51. FRANK WHITE.
52. ARTHUR RAMSEY, his mark.
53. GEORGE RAMSEY.
54. NOAH WEBSTER.
55. CYRUS PHILLIPS.
56. THEODORE McCAULEY.
57. WILLIAM P. CALLON, his mark.
71. THOMAS MITCHELL.

- 72. CLYDE SHERIDAN.
- 73. LEON C. FONTENELLE.
- 74. SAMUEL IRWIN, his mark.
- 75. SILAS WOODS.
- 76. OSCAR THOMAS MITCHELL.
- 77. MORGAN MORRIS.
- 78. CLYDE WALKER.
- 79. LOUIS WEBSTER.
- 80. FREDERICK MERRICK.
- 81. GEORGE WEBSTER.
- 82. EDWARD McCAULEY.
- 83. JOHN G. MORRIS.
- 84. ANDREW LYON.
- 85. DAVID B. WELLS.
- 86. JAMES T. WOLF.
- 87. BERT BAXTER.
- 88. PETER BLACKBIRD.
- 89. BERTRAN FREEMAN.
- 90. DAVID MORRIS.
- 91. ARDENT SAUNOC.
- 92. FRANK TYNDELL.
- 93. HENRY GRANT, his mark.
- 94. GEORGE MILLER.
- 95. PAUL LOVEJOY."

The United States offered in evidence a duly certified copy of Exhibit 33, which reads as follows:

Department of the Interior.
United States Indian Service.
Omaha Agency, Macy, Nebraska.

January 24th, 1912.

Commissioner of Indian Affairs,
Washington, D. C.

SIR:

In response to what appeared to be a general demand, the following notice was served upon the Omaha tribe of Indians as of January 17th, 1912:

'A general Council of the Omaha Tribe is called for Wednesday afternoon, January 24, 1912, for the purpose of deciding whether or not it is the wish of the tribe to send a delegation to Washington to consult with the Commissioner of Indian Affairs and the Indian Committees in the House and Senate for the purpose of securing the passage of a bill providing for the sale of the unallotted land upon the Omaha Reservation; and for the further purpose of au

thorizing that the expenses of this delegation be defrayed from moneys now in the hands of the Government; proceeds of the rentals of these unallotted lands.'

(Signed)

ALBERT H. NEALE.

Supt. & S. D. A.

Omaha Agency, Macy, Nebr., January 17th, 1912.

On the same date I wrote the Indian Office, asking authority to send a delegation, composed of three members, to Washington, for the purposes set forth in the above call, and asking that 'Proceeds of Labor, Omaha' be used to defray the expenses, by telegram, dated January 21st, 1912, those authorities were granted.

Pursuant to the above call there assembled at Omaha Agency, on Wednesday afternoon, January 24, 1912, about seventy-five Omahas, representing the tribe. The meeting was called to order by the Superintendent. The call was read. And the tribe was asked if it was their desire to send a delegation to Washington for the purposes set forth in the call. It was moved and seconded that the Omaha tribe send a delegation to Washington for the purposes set forth. In the remarks that followed, it was brought out by Hiram Chase, Omaha, that there were doubtless other matters, besides those set forth in the call, which should be taken up by this delegation. The question was put and carried; there being fifty-six voices in favor and none opposed.

The Superintendent then called for nomination and the following persons were named: Frank La Flesche, Thomas McCauley, and Daniel Webster. There being no other nominations, the Superintendent called for all those who were in favor of selecting Frank La Flesche as one of the delegation to represent the Omaha Indians at Washington to raise their hands. The vote showed forty-nine in favor and one opposed. A similar vote was taken upon the name of Thomas McCauley, and showed forty-two in favor and two opposed. A similar vote was taken upon the name of Daniel Webster and showed forty-three in favor and two opposed. The Superintendent declared Frank La Flesche, Thomas McCauley and Daniel Webster elected.

The question was then put: 'Shall the tribe authorize the expenditure of 'Proceeds of Labor, Omaha' sufficient to defray the expenses of the delegation.' The vote taken on this question showed forty-three for and two against.

Respectfully,

ALBERT H. NEALE.

Supt. & S. D. A.

I, Levi Levering, Official Interpreter at Omaha Agency, Nebraska, certify that I have read the above letter; that I interpreted at the Council of the Omahas held at Omaha Agency, on the afternoon

of January 24, 1912, and that the Superintendent has truthfully set forth all of the proceedings of such Council in the above letter.

LEVI LEVERING,
*Official Interpreter,
 Omaha Agency, Nebraska.*

The United States offered in evidence a duly certified copy of Exhibit 34, which reads as follows:

"To the Honorable Commissioner of Indian Affairs,
 Washington, D. C.

(Rec'd Feb. 6, 1909).

We, the undersigned adult members of the Omaha Tribe of Indians in the State of Nebraska respectfully state:

Whereas, there is about 5000 acres or more of tribal land which is unallotted, and which belongs to the Omaha Tribe of Indians of Nebraska, and held in common by them,

And whereas, it is for the best interests of all parties interested that said tribal land be disposed of in some suitable manner,

And whereas, it is not for the best interests of the tribe at the time that this land should be held any longer as tribal lands:

And whereas, said lands cannot be disposed of or allotted in severalty without a special Act of Congress authorizing the same:

And whereas, there is now on the Omaha reservation about 500 Omaha children who have not received any allotment of land, and cannot now receive any allotment of land for the reason that they have been born subsequent to the passage of the last Allotting Act of the Omaha Indians March 3, 1893:

And Whereas, it would be for the best interests of all parties concerned that said tribal lands, except those hereinafter designated to be given to said Omaha children born subsequent to said [allotting] act of March 3, 1893, and who have received no allotments:

And whereas, if said land was allotted to said Omaha children in severalty, each child would receive only about ten acres, which would be so small a tract of land that the allottee could not dispose of the same or could not lease the same to advantage, and not without suffering a loss, and could not obtain its actual value, either for sale or rent, said land being of unequal quality and value, said allotments would and could not be of equal value, and some children would receive lands worth more than others:

And whereas, by reason of the foregoing fact, it is decreed best that said tribal lands, except those hereinafter designated be sold and disposed of under the rules and regulations of the Secretary of the Interior and the proceeds derived therefrom, be divided equally among the Omaha Indian children born subsequent to the said allotting Act of Congress March 3, 1893, and who are living at the time said land is sold, and that the Secretary of the interior have control over the moneys derived from said sale, and that the said

be held as a benefit fund for said children until they attain their majority.

And whereas, we desire that the Southwest quarter of the Southwest Quarter of Section 24, Township 25, Range 9, together with the buildings and improvements thereon, be transferred and deeded to the Presbyterian Board of Home Missions for the use of the Presbyterian Mission among the Omaha Indians, provided that if the premises so transferred shall cease to be used for religious or educational purposes amongst said Indians, the same shall revert to the Omaha Tribe of Indians;

And whereas, we desire that the seven acres off from the North Side of the Southeast Quarter of the Southwest Quarter of the Southwest Quarter of Section 24, Township 25, Range 9 be set aside as a cemetery for the use of the Omaha Indians, and that the title thereto shall be vested in a Cemetery Association to be organized under the laws of the State of Nebraska.

And whereas, we desire that the Southeast quarter of the Northeast Quarter of the Northwest Quarter of Section 25, Township 25, Range 9 and all of the Southeast Quarter of the Northwest Quarter of said Section 25 Township 25 Range 9 except a strip four rods wide extending along the entire north side of the Northwest quarter of the Southwest Quarter of the Northwest Quarter of Section 25, Township 25 Range 9 be reserved for the use of the Government for Agency purposes so long as it may be required for that purpose.

And whereas, we desire that the remainder of the South Half of the Southwest Quarter of Section 24, Township 25, Range 9 and the remainder of the Northwest Quarter of Section 25, Township 25, Range 9, except ten acres thereof, be set aside as a site for a hospital and to be used for Hospital purposes, be plotted into town lots of not to exceed one acre in size, and sell to the Members of the Omaha Tribe of Indians, the proceeds of the sale to be placed in the Tribal Fund.

Now, therefore, we the undersigned, respectfully petition and ask that the necessary legislation be secured in the present session of congress or as soon thereafter as possible, for the disposal of said tribal lands in the manner and conditions as above set forth.

Respectfully submitted.

Name.	Married.	Single.	No. of children who have not received allotment.
Caryl E. Farley	Yes	....	2 Two
Reuben Harlan .....	"	....	2 "
Frederick Merrick .....	"	....	None
George Woodhull .....	"	....	2
R. H. Cobney .....	"	....	1
Edward Farley, guardian for Edward Farley, child of Rosalie Farley .....	"	....	1
Wahme Burt .....	"	....	None
John F. Farley .....	"	....	None 2 dead

Name.	Married.	Single.	No. of children who have not received allotment.
Charles Wood	Yes	.....	None
Fanny Kemp .....	"	.....	None 2 dead
Edward Robinson .....	"	.....	2
Levi Levering .....	"	.....	Five
Frank Saunsoei .....	.....	.....	5
Sam Parker .....	.....	.....	2
Elkborn Black .....	.....	.....	2
Horace Walker .....	.....	.....	6
Jackson Fremont .....	.....	.....	..
James Walker .....	.....	.....	2
Mitchell Dick .....	.....	.....	..
86 John O. Lyon .....	.....	.....	2
Parish Saunsoei .....	.....	.....	2
David Cox .....	.....	.....	..
Frank Tyndall .....	.....	.....	4
Peter Blackbird .....	.....	.....	2
Alex Black .....	.....	.....	2
Peter Webster .....	.....	.....	1
Edmund Sherman .....	.....	.....	3
Edward Staldes .....	.....	.....	..
Louis Dick Lami .....	.....	.....	4
James Staldes .....	.....	.....	1
Louis Laf. Farley .....	.....	.....	..
George W. Fox .....	.....	.....	2
Paul Lovejoy .....	.....	.....	4
W. T. Diddock	Yes	.....	4 living 1 dead.
Oscar Sedig .....	.....	.....	2 " 1 "
Charles A. Parker .....	.....	.....	None
David Webb .....	.....	.....	..
Little Girl Walker .....	.....	.....	..
Marguerite L. F. Diddock .....	.....	.....	4
Davis Lovejoy .....	.....	.....	..
Grace Springer .....	.....	.....	6
Clara Logan .....	.....	.....	6
William F. Springer .....	.....	.....	..
Susan La Flesche, Picotte, M. D. ....	.....	.....	2
Joseph Dick .....	.....	.....	3
Henrietta Read Freusent	Yes	Yes	..
Levi Woodhull	"	"	4
Gertrude V. Provo	"	"	..
Frank Cox	"	"	4
Henry Sherman	"	"	..
Orin Mitchell	"	"	4
Robert Mitchell	"	"	1
Thomas Mitchell .....	.....	.....	..
George Fields	"	"	1
Chas. W. Grant	"	"	4
Lizzie Torney	"	"	1

Name.	Married.	Single.	No. of children who have not received allotment.
Thomas O. Webster.....	...	Yes	..
George Ramsey	3 dead
Hiram Walker	"	"	one and one dead.
Francis Fremont	"	"	2
Mary Pilcher	3
Harry Harlan
Harvey Warner
Charles Pilcher
Thomas McCauley
Thomas Walker	2
Fred Kemp	2
John Brown, Jr.	4
Seal Mitchell	3
Barley Wells
Elwood Harlan
Correy La Flesche
Laura Reese	1
James Fremont
Jose Cox	1
Antoine Calney
Richard Krush
Thomas Fremont
Howard Wolf	2
Charles S. Woodbull	2

The United States offered in evidence a duly certified copy of Exhibit 35, which reads as follows:

"Mar. 13, 1912.

Messrs. Thomas McCauley et al.,

Indians of the Omaha Tribe,

Through Superintendent Omaha Indian School,

Macy, Nebraska.

MY FRIENDS:

I have received your petition signed by 141 members of the Omaha Tribe, for the re-presentation to Congress, with favorable recommendation, of the bill authorizing the sale of the Omaha tribal lands.

On February 14, 1912, the Department return- copy of Senate Bill 660, 62nd Congress, 2nd Session, providing for the sale of the Omaha tribal lands, to the Senate Committee on Indian Affairs with a favorable report thereon.

Respectfully,

(Signed)

F. H. ABBOTT,
Acting Commissioner.

Petition.

We, the undersigned, members of the Omaha Tribe, residing on the Omaha Reservation, Nebraska, hereby petition the Honorable Secretary of the Interior and the Honorable Commissioner of Indian Affairs that the bill presented to Congress for the sale of the Omaha tribal land remaining unallotted, be re-presented recommending the passage of same.

1. CHARLES WOOD.
2. JOHN WOOD.
3. NEAL MITCHELL.
4. HENDRICK BLACKBIRD.
5. TOM O. WEBSTER.
6. GUY STABLER.
7. FRANK COX.
8. CLARA S. HOGAN.
9. ARTHUR MITCHELL.
10. PHILIP ILER.
11. JACOB PARKER.
12. FRANCIS FREMONT.
13. DANIEL PARKER, his mark.
14. CARYL E. FARLEY.
15. ROY D. STABLER.
16. ISAAC PRESTON.
17. SUSANLA F. PICOTTE.
18. M. LA F. DIBDOCK.
19. YELLOW FOX, his mark.
20. RACHEL SHERIDAN HARLAN.
21. HELEN WARNER.
22. LARRY J. HOGAN.
23. WALT P. HAMILTON.
24. REUBEN HARLAN.
25. IKE McCAULEY.
26. CHAS. T. MORRIS.
27. GEORGE WOODHULL.
28. ALBERT B. WELLS.
29. CHAS. ROBINSON.
30. PURNAB ROBINSON.
31. DANIEL WALKER.
32. HIRAM WALKER.
33. DAVID COX.
34. ALBERT PRESTON.
35. CHARLEY WOLF.
36. CHAS. THOMAS.
37. GEORGE BLACKBIRD.
38. JOHN CAULY.
39. THEODORE THOMAS.
40. JEREMIAH McCAULEY.
41. WALT TYNDALL.
42. PETER WEBSTER.

43. ELKHORN BLACK.
44. BERT MITCHELL.
45. ARTHUR DALE.
46. HENRIETTA FREMONT.

THOMAS McCauley testified for the defendant: I live on Omaha Reservation; am 74 years of age, and a member of Omaha tribe of Indians. I have been a member of the Council of the tribe. I served in the Civil War for 3 years, Co. "H," First Nebraska Volunteer Cavalry.

I think Voner was Colonel and Armstrong Major. "I think it was John Sherman or John Sheridan," that was Commander of that company. "Those seemed to be the prominent men at that time." I was a corporal.

I have lived continuously on the Omaha Reservation from that time until the present. I was present at the Council of Omaha Tribe of Indians on Wednesday afternoon January 24, 1912. I was notified of that Council meeting. There were in all 12 members of the Council of which I was one. All the members of the Council were at that meeting at which we considered the matter of disposing of the unallotted lands of the Omaha Indian Reservation.

Whenever the tribe meet together and sit in a tribal meeting they say something for the welfare of the tribe, "and I suppose they talked about this land at that time." "At that meeting all those that were present were in favor of selling the unallotted land." When the tribe met, they discussed various things, among them was this unallotted land. The majority of the tribe were in favor of selling the land and the proceeds should go to the minor children who have not had allotments. A vote was taken and all those in the room in favor of the proposition of selling the land stood up. I did not know at one time how many there were present who stood up, but I have forgotten now. All those who heard the proposition stood up, even the women. There was one man opposed to this proposition but I cannot recall his name but all those that were in the room voted in favor of it. I don't think all the tribe were present, but those that were in favor of the proposition of selling the land were present and those that stayed away I understood were in favor of selling it.

90 All the members of the Council of the tribe were in favor of selling the land and all of the members of the Council were present.

At that Council meeting, the sending a delegation to Washington in reference to this matter was considered, and three delegates were elected to go to Washington on this subject, namely, Thomas McCauley, Daniel Webster and Frank La Flesche. I am the Thomas McCauley who was one of the elected delegates.

Daniel Webster is dead and Frank La Flesche is a clerk in the Indian office at Washington, and was a man of prominence in the tribe at the time of that council meeting. These three men went to Washington pursuant to that election. Frank La Flesche spoke the English language and was the head of our delegation.

Upon reaching Washington we went to see our Congressman, Daniel Stephens, and explained to him what we wanted relating to the sale of the unallotted lands upon the Omaha Reservation. I stated that the unallotted lands on the Reservation was not sufficient to make allotments for all the children which was the main reason the tribe wanted to sell the land to the end that the proceeds should go to the children.

We also visited other officials in Washington and explained to them the desires of the tribe. We went to see Senator Brown and Senator Brown said that he had already talked with Frank La Flesche on the subject and understood what was desired. We afterward went to see the Secretary of the Interior on the same matter and explained to the Secretary the kind of legislation the tribe wanted, "and that was to pass a bill in Congress so that the unallotted land of the Omaha Reservation should be sold because the land was too small to make allotments among the children", so that the children who now have no allotments would get their share of the proceeds of the sale of the unallotted lands which should be equally divided among them, meaning "those children that were born after March 3, 1893."

The Secretary of the Interior said he would take this matter up with Congress. The expenses of this delegation were paid from the tribal fund of the Omaha Indians. That is a correct photographic copy of what purports to be my signature on the last page of Exhibit 34.

91 Cross-examination of Thomas McCauley:

"There were between eighty and one hundred" Indians present at that council meeting when the delegates were selected to go to Washington. They were all there in one room.

"All those that were present voted unanimously." That is not a correct statement in the report of that meeting by Superintendent Albert H. Neale, (Ex. 33, supra), that there were forty-three votes in favor of sending these delegates to Washington and two against.

"Q. I will read to you what is in the report of Albert H. Neale, to wit: 'The vote taken on this question showed 43 for and 2 against.' I read this from Exhibit 33. Is what I read to you a correct statement or a false statement?"

A. I could not hardly remember the number of votes at that time. That is the number of official votes. I could not say who were against it, but if there were only 43 voted in favor of my going to Washington I would not have gone there. There were over one hundred that were in favor of my going there. That is why I went."

A record in writing was kept of that meeting but the man keeping the record "was not posted as to the correctness of the minutes." I cannot give the name of the Secretary who kept the minutes. Albert H. Neale, the Superintendent, was present at that meeting and Levi Levering, the official interpreter, was also present at that meeting, and the same Levi Levering who was the then official interpreter is the same person who is interpreting my testimony at the present trial.

HARVEY LYON testified for the United States: I am a member of Omaha tribe of Indians. I am about 59 or 60 years of age and have lived on Omaha Reservation ever since I was a boy.

I was a member of the Council and have been since 1913. I know Thomas McCauley, Daniel Webster and Frank La Flesche very well. I was a member of and present at that Council meeting when these men were selected as delegates to Washington. When the Indians "met they talked, and they sent the delegation to Washington." "The purpose of that meeting was first to sell the unallotted lands, the next to send a delegation to Washington." "The matter of the unallotted lands was the main issue among the Omaha tribe in general, and the majority of the people decided to sell the
92 unallotted land. That was the reason why the tribe sent three delegates to Washington."

"The vote was that in case they sent a delegation to Washington their interest is to sell unallotted land, and give the proceeds of the money to the children that have no allotment." "I am the man that nominated those three persons."

"A. When the Council and the tribe met, the intention was to send delegates to Washington, and when they met the speaker ahead of me spoke something here and there, and I got up, and I nominated Thomas McCauley, Daniel Webster and Frank La Flesche—Frank La Flesche who has been employed in the Indian Office, and he was spending his vacation among his own people, and I suggested that would be the proper person to represent us. These men are the famous men among the Omahas, and they are not afraid to speak on anything, and I think are the proper persons to send to Washington who would do us good, and the tribe voted by rising votes, and all those that were present in the room voted."

It is a pretty hard matter to get our people together in open meeting. Some of them seem very careless about attending and those of us who have always been interested have attended a meeting of that kind, and I know one person who was always opposed to voting.

I cannot give you definitely the number of Indians that were present. The room was full. I know that the selected delegates did go to Washington.

Cross-examination:

"Whenever the tribe met and discussed anything I generally took an active part, and that is why I suppose the tribe have elected me to be a member of the Council."

I must have been elected a member of the Council before that meeting at which the delegates were selected. "There are only twelve members" of the Council, but this meeting in January, 1912, was a meeting of the men of the Omaha Indian Tribe and the members of the Council were also present.

I think that Levi Levering, the official interpreter was present at that meeting, and that Albert H. Neale, the Superintendent, was at that meeting.

I do not think there were 43. I thought more than 43, those

that were present on that day. He said there must be a mistake in putting the figures down. Of course, those who voted against the delegates, they ought to put their—like those in favor of sending the delegates—they ought to put their words in on that day.”

All the tribe that were there were in favor of selling the land. Only one voted against it. I afterward learned there were others that wanted allotments but it was too late.

LEVI LEVERING, testified for the United States; I am a member of Omaha tribe of Indians; 52 or 53 years of age, and have lived on the Reservation all my life. I was present at the Tribe and Council Meeting on January 24, 1912. I am the official interpreter at the Agency, but was not the official interpreter at that meeting, but was present. Nearly all of the most prominent men of the Tribe were there. Superintendent Albert H. Neale was there.

This Tribal Meeting was called by the Council. The main thing [transacted] at that meeting was to elect delegates to go to Washington “to confer with the officials in Washington in reference to the tribal land on the Omaha Reservation. The tribe instructed these delegates to confer with the Commissioner of Indian Affairs, the House Committee on Indian Affairs, and also the Senate Committee on Indian Affairs, for the purpose of passing a bill for the sale of unallotted lands.”

The tribe had talked of this matter a great deal before the meeting and the men understood that the tribe wanted to sell the unallotted lands and the proceeds were to be given to the unallotted children. The Council gave the tribe preference in acting on this matter and the meeting voted to send three delegates to Washington; Daniel Webster, Thomas McCauley and Frank La Fleche. I suppose the certificate (being Exhibit 33 showing the number who voted in favor of this motion) must be correct because I was interpreter there at that time.

That is my signature to the certificate on Exhibit 33 and the facts set forth and recited in Exhibit 33 are a true statement of what took place at the Council and tribal meeting on that day.

Cross-examination:

Notice of tribal meetings are usually posted up in the post-office of the Agency building, and that notice was posted on January 17—seven days before the meeting held January 24th.

94 CARYL E. FARLEY testified for the United States; I live in Sioux City, Iowa. Am engaged in real estate and farm loan business. I have an office in Sioux City, Iowa, and an office in Walthill, Nebraska. I am a member of Omaha tribe of Indians and am about one-eighth Indian blood. I have four children who are members of the Omaha tribe. I am 37 years of age; attended Nebraska State University; during the year 1912, in the line of my business, I was at Walthill and on the Reservation. The Omaha Agency is at the town of Macy, which is eight miles distant from

Walthill. Frank La Flesche is my uncle. I was present at a tribal and Council meeting January 24, 1912, which took place in the Council room in the shop building at Macy, which was the usual meeting place for the tribe for their public gatherings.

"That meeting was called for the purpose of choosing a delegation to go to Washington to assist the Indian office in procuring legislation for the purpose of finally disposing of the unallotted land by sale, and this delegation was chosen, and the Council was present, and a good many of the members of the Tribe, and they discussed other subjects besides this subject which they always do at every Council, but this subject of disposing of these unallotted lands was the principal subject, and I remember Harry Lyon spoke."

"He was the man that nominated the delegation, and the Council and the Omaha men and women present voted these men in, and they were Frank La Flesche, Thomas McCauley and Daniel Webster, who were the men to be sent to Washington as a delegation to assist in procuring the desired legislation."

Practically everybody present was in favor of sending the delegation to Washington for the purpose of having the unallotted lands sold and the proceeds given to the unallotted children. There were some dissenting votes.

"Q. Do you know who dissented?"

A. I think Hiram Chase and I think Alfred Blackbird and Nebraska Holloewell."

I do not remember of any others.

"The agent usually calls a meeting of the Council and the members of the Tribe also attend the meetings, and the Council members are the first ones to speak on a subject, and after they discuss it their vote is usually taken, and then the vote of the Tribe in the room is taken, and later years they also take the vote of the women. We take the vote and the men and women both. They all stand.

95 At this Council meeting in 1912 the members of the tribe had a right to speak after the members of the Council had spoken. I think the women present at that meeting did vote and all the men voted.

I think I know every man and woman of the Omaha tribe and most of the children. I knew all of the adult members of the tribe January 24, 1912.

"I think that the leading and prominent members of the tribe who had children that had not received allotments were present." That is a correct photographic copy of my signature on the first line of Exhibit 34.

"Q. About what date was it that you circulated that petition if you know?"

A. It was, I circulated this petition at the Council that was held on January 24, 1912, and for several days after the meeting, and I sent it to Washington during the first part of February. I wrote a letter to the Commissioner and sent this petition."

"Q. Did you circulate this petition attached to Exhibit 34?"

A. I did.

Q. Did you see each one of the signers to that petition sign it?

A. I did.

Q. And did the parties whose names appear on Exhibit 34 that is the petition attached to Exhibit 34, sign that instrument in your presence?

A. They did."

"The Council is the business body of the Tribe. They are the representatives of the Tribe. And they are chosen from the different parts of the Reservation so that they will represent the people who live on the Reservation, and the Agent confers with the Council and takes up matters that affect the Tribe with them when he deems it necessary, or when the Commissioner of Indian Affairs requests it; and as a rule the Council after discussing the matter put to them for their consideration ask the members of the Tribe present to speak. The Council often meets, and there will only be probably eight or ten people present beside a quorum, but anybody can come in that wants to, and if he has anything to suggest to the council on the subject in hand he may do so after the Council has first considered it."

"As a rule the Council members serve for a certain length of time, and the Secretary of the Council is supposed to keep a record of minutes and he is also supposed to make a certificate which is signed by
96 the President of the Council and the Secretary when any new members are elected to the Council, and the certificate is usually filed with the agent, so that the agent knows who are the members of the Council."

I did meet Major Rankin, who, at one time, supervised the making of allotments to Omaha Indians. At that time, I was living at Bancroft, Nebraska. My father's name was Edward Farley and he is still living. Bancroft is located about 18 miles southwest from the Agency at Macy. The Reservation extends up to the limits of the town of Bancroft. I was present with my father at a Council meeting of the male adult members of the Tribe at the time when Major Rankin laid before them the provisions of the Act of March 3, 1893. I remember that Major Rankin made an explanation to the members of the Tribe and to the Council present of the contents of the Act of March 3, 1893. Major Rankin was assisted by an interpreter.

"Before Major Rankin held this meeting at the agency and explained the conditions of the allotment as stated in the act of March 3, 1893, there was a great deal of uncertainty among the Indians as to whether they were sure they wanted this allotment, because they did not understand just what the allotment—just what persons would participate in the allotment, and I remember some of the members of our family were opposed to the allotment. My uncle Noel La Flesche and some others, and there were two factions, one called the progressives and one called the non-progressives. The people that wanted the allotment were called the progressives and our faction was called the non-progressives, but when Major Rankin explained to us that the children who had died held allotments before March 3, 1893, would not get allotments, it was disappointing news, because we had one of our members of our family we thought should have an allotment, and when he explained to us that all children living at that time would have allotments we were more satisfied; all children living who did not have allotments, and who were living on March 3,

1893, because my brother Fletcher and my brother, Louis, and my sister Marguerite, and my brother La Flesche had not received any allotments. And he also explained the children that were born after March 3, 1893, would not receive allotments, and this was a disappointment to many of the Indians because there were a large number of children born after that time."

"* * * and their parents were expecting and were wondering whether these children would get allotments; but on the whole the Indians were satisfied with the bill, and I remember that they voted to accept the allotments."

"They flocked to the allotting agent to try to get allotments under that act of March 3, 1893.

"Q. When was this meeting at which Rankin was explaining the construction of the act when this thing occurred?

A. That was in the spring of 1899. I think it was in May."

Cross-examination of Caryl E. Farley:

I have lived in Sioux City, Iowa, since September, 1911. One of my brothers, John F. Farley, lives in the town of Bancroft, Cuming County, Nebraska. The Omaha Indian Reservation adjoins the town of Walthill where I have one of my real estate offices. My other real estate office is in Sioux City, Iowa. We went into business at the town of Bancroft, Nebraska, in 1902, and in 1911 started business in Walthill and the same year started business in Sioux City, and have been actively engaged in real estate business in lands surrounding that whole part of Nebraska, including the Omaha and Winnebago Reservations.

I am one-eighth Indian and seven-eighths white, and that is true of my brothers. I was present at the meeting January 24, 1912, when McCauley, Webster and La Flesche were elected delegates to go to Washington City.

That was the only meeting I was present at and at which meeting Mr. Albert H. Neale, Superintendent, was present and Levi Levering was the official interpreter at said meeting. I think I saw the report which Mr. Neale, as superintendent, made of that meeting and certified to by Mr. Levi Levering as official interpreter, being Exhibit 33.

I never saw Exhibit 33 before it was presented to me at this trial. I recognize the concluding part of that report of the Superintendent and the certificate thereto as being correct "but I do not think that the number there is quite the correct number of the people present and voting." After that meeting I circulated the paper, being Exhibit 34, with my name on the first line of the signatures thereto.

"Q. Now, Mr. Farley I will ask you one question, what occasion was there for you—or why did you circulate the paper to get these signatures after that meeting of January 24th, 1912?

A. I did that for the purpose of showing to the Commissioner that it was the desire of the people who signed that petition that the land be sold, and that the unallotted lands be sold, and the money apportioned among the children who did not have allotments as it was set out in that petition.

Q. Did you not understand that these three delegates, McCauley, Webster and La Flesche had been elected and sent to Washington to make that same identical representation to the Department?

A. I did.

Q. Well, then did you suppose that that letter would carry more influence than you expected of the properly elected delegates?

A. I thought it would help the Commissioner, and also I wrote to our Congressman and our Senators, and I was the one that sent in that petition to the Commissioner, and in my letter I stated the reason why I sent it in. The superintendent did not want to send it in for the reason that there were some of the members of the Tribe who had mentioned to him that they wanted to have the lands allotted to the children as they were born after the act of March 3, 1893, was passed."

I did sign the letter transmitting this list of names of the people who signed that petition. The photographic copy does not have any signature to the petition but I have a copy of the letter that went with the petition.

"Q. How long after the meeting of January 24, 1912, was it, as near as you can tell when you got these signatures to this so-called petition and sent it to Washington?

A. I got some of them at this same meeting, and the people came to me afterwards and wanted to sign, and they signed, and I think that I sent that letter, or the letter accompanying this petition, and this petition, to Washington about the third of February, 1912.

Q. Now, I will ask you to look at that and see if that does not have the Government stamp on it of 1900—

A. I made a mistake. In 1909 is when it was signed.

Q. Then you are mistaken in your whole testimony on that matter?

A. I am.

Q. Then you did not get these signatures for that meeting of 1912 did you, if that was sent down there three years before?

99 A. I will admit I made a mistake in that, but this was after this meeting in 1909 when this was sent.

Q. Then these signatures, and this petition was obtained three years before that meeting of January 24, 1912?

A. That is correct."

"Q. So then I take it that your whole testimony as to when you circulated this petition, and when you got these signatures is all wrong, and your memory about it is wrong. You admit that now do you not?

A. I admit that that part is wrong."

I do know that a petition was sent to Washington along the same lines about February, 1909, and at which time there was a meeting at the agency when the matter was considered by the Indians. They had been discussing the matter for several years and the bill was introduced in Congress in 1911 but did not pass.

WALTER C. DIDDOCK, testified: I am engaged in real estate business, in farming, and live at Walthill, Nebraska. I am one of the persons who signed Exhibit 34. There are between 5,000 and 6,000

acres of tribal land on Omaha Indian Reservation. I have lived on or in the vicinity of the Reservation since 1899 and was Industrial teacher for six years. My wife was a teacher and afterwards a field matron. Somewhere near 500 children were born on the Reservation since March 3, 1893, and living January 24, 1912.

I was at the meeting called by Major Rankin at Omaha Agency in May, 1889, at which time the act of March 3, 1893, was submitted to the Tribe and considered. "I heard the Allotting Agent Rankin tell the Indians about the Act and in particular about those who would receive and be entitled to allotments, and he said that those who were living on March 3, 1893, would be entitled to allotments."

"Q. What about those who were born after March 3, 1893, what was said on that?"

A. He stated that they would not receive allotments.

After the explanation of the provisions of the Act, a vote was taken. "They were unanimously in favor of being allotted under that act."

I was present at a meeting January 24, 1912, when delegates were elected to go to Washington, you might say to lobby for "the bill to have all of the residue of the unallotted tribal lands sold and the proceeds divided among those children who had no allotments."

100 At that meeting the Tribe and the Council took a vote on the matter and selected the delegates and agreed to defray their expenses out of the tribal fund.

"Q. What vote did they take on the matter, explain that? What was the matter that they were voting on?"

A. Whether they would sell the tribal land or have it allotted and as the matter had been talked over many times before that it seemed to be clear in their mind, and there wasn't very much discussion, in their talks the Indians said that there was so little land and so many children, and the land was in such condition that it could hardly be satisfactorily divided, that they thought the most equitable way of selling it was to allow it to be sold and then the money divided among those children who had no land, and after that was discussed they took a vote on it, and there was quite a large crowd there. The room was well filled and men and women—many of the women voted with the men.

Q. How was that vote on that question?

A. With very few exceptions they were all in favor of it."

The meeting I refer to was the same vote and meeting that Mr. Levi Levering testified about in this case, being the same meeting when Webster and McCauley and La Flesche were selected as delegates to go to Washington. I heard Mr. Levering testify that there was a record of the vote taken at that meeting and certified to by Mr. Levering as interpreter and a report of the same was made by Albert H. Neale, the Superintendent.

I am an Englishman, although born in the United States and am not an Indian. My wife is about one-fourth Indian blood. I live in Walthill, Nebraska.

CARYL E. FARLEY, recalled testified for defendants: I think there are about 4,500 and 5,000 acres of tribal land in the Omaha Indian Reservation.

I think there were between 500 and 600 Omaha Indian children living on January 24, 1912, who had been born since March 3, 1893. The unallotted lands would average about 9 acres for each child. I don't think there is any more tribal land now than there was in 1912.

I believe there are about 600 Omaha Indian children born since March 3, 1893, and now living who have not received allotments. Some of the tribal land along the Missouri River consists of sand bars and willows. Some of it is very good land. I think
101 about one-third could be called good land and two-thirds poor land. This land could not be equitably divided into small tracts.

EDWARD FARLEY, testified for the defendants: I am 72 years of age and am the father of Caryl E. Farley. My wife is part Indian. I have lived within about one mile of the town of Bancroft about 32 years. I did know Major Rankin and was present at a meeting of Omaha tribe of Indians in May, 1899, when Major Rankin explained the bill of 1893. Major Rankin said, "Those that were born after 1893 would not be entitled to allotments." After he made this explanation, I think the tribe voted on it and "they accepted it" and then Major Rankin then proceeded to make the allotments.

Cross-examination.

By Mr. Webster:

I am an Irishman not an Englishman. "I want an Omaha Indian to tell this story instead of an English-Irishman telling it.

AMOS MITCHELL testified for the United States of America:

I am a full-blood Omaha Indian and live on Omaha Reservation. Am 48 years old; am married, and have seven children. I have travelled over the country with Buffalo Bill but did not go to Europe.

I was present at the Omaha Agency when the Omahas on January 24, 1912, selected Frank La Flesche, Daniel Webster and Thomas McCauley as delegates to go to Washington. The Indians held that meeting to send these men to Washington to sell these tribal lands. "Hardly enough to divide among the children and so they thought it would be best to sell it and distribute the money among the children that had no allotments." At that meeting there were representatives of heads of families, the leading men and members of the Council. Those present did vote on the question of selling the unallotted lands and decided to select some man to go to Washington to have a bill presented to Congress authorizing the sale of the lands, the proceeds to be divided among the children who had received no allotments. The delegates elected were Mr. La Flesche, Dan Webster and Mr. McCauley. They went to Wash-

ington and their expenses were paid out of the tribal funds.
 102 The bill that was finally passed was the one discussed by the Indians in this meeting.

(Testimony for Plaintiffs in Rebuttal.)

WILLIAM F. SPRINGER, testified for the plaintiffs in rebuttal:

I am a member of Omaha Tribe of Indians. I have looked over the names signed on Exhibits 32, 34 and 35 and have made a comparison of the three exhibits for the purpose of ascertaining if there are duplications of names thereon, and have made a list of duplications which are set forth in Exhibit 36. The 29 names on Exhibit 36 are names which appear on more than one of these exhibits 32, 34 and 35. I personally know the Indians whose names make up the 29 duplication-. Exhibit 36 is as follows:

- | | |
|--------------------------|------------------------|
| 1. Ruben Harlan. | 15. Horace Walker. |
| 2. George Woodhull. | 16. John C. Lyon. |
| 3. Peter Webster. | 17. C. La Flesche. |
| 4. Elkhorn Black. | 18. George Fields. |
| 5. Henrietta Fremont. | 19. Levi Levering. |
| 6. Neal Mitchell. | 20. Louis Dick. |
| 7. Frank Cox. | 21. James Stabler. |
| 8. Clara S. Hogan. | 22. George Ramsey. |
| 9. Francis Fremont. | 23. James Fremont. |
| 10. Caryl E. Farley. | 24. Joe Dick. |
| 11. Susan La F. Picotte. | 25. Thomas Mitchell. |
| 12. M. LaF. Diddock. | 26. Frederick Merrick. |
| 13. Thomas McCauley. | 27. Peter Blackbird. |
| 14. Harvey Warner. | 28. Frank Tyndall. |
| 29. Paul Lovejoy. | |

I find on Exhibits 32, 34 and 35 the names of persons who are not members of the Omaha tribe of Indians and those whose names are on said Exhibits who are not members of the tribe I have written down on Exhibit 37, and each of whom I know personally excepting Harry Doreaux. Exhibit 37 reads as follows:

"Hiram Walker, Harry Doreaux, W. T. Diddock, Oscar Sedig."

103 I have prepared another exhibit setting forth the persons whose names appear on Exhibits 32, 34 and 35, who are women and not male members of the Omaha Tribe of Indians, and which said names are set forth in Exhibit 38, which is received in evidence and reads as follows:

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|-------------------------|----------------------------------|
| Clara S. Hogan. | Lizzie Torney. |
| Susan La F. Picotte. | Mary Pilcher. |
| Rachel Sheridan Harlan. | Laura Reese. |
| Helen Warner. | Marguerite La F. Diddock. |
| Fannie Kemp. | Grace Springer. |
| Henrietta Read Fremont. | Clara Logan. |
| Gertrude W. Provo. | Susan La Flesche Picotte, M. D." |

On defendant's Exhibit 35, being the petition purporting to be filed in the office of Indian Affairs February 26, 1912, containing 46 names, there are the names of six persons that are women and not male members of the tribe and which six names I have set down on Exhibit 39, which exhibit is received in evidence and reads as follows:

"On petition filed Feb. 26, 1912, there appears six women as follows:

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| "No. 8. Clara S. Hogan. | 20. Rachel Sheridan. |
| "17. Susan La F. Picotte. | 21. Helen Warner. |
| "18. M. La F. Diddock. | 46. Henrietta Fremont." |

"Q. I now hand you a package of papers composed of three sheets fastened together, purporting to contain 301 names, and ask you, Mr. Springer, whether you personally know the persons whose names are set down in that tabulated list, and if so whether they are male members of the Omaha Tribe of Indians, and were such in January, 1912?"

A. I know nearly every member on this list, and they were legal voters of the Omaha Tribe in 1912.

Q. When you say they were legal voters, you mean they were 21 years of age and over?

A. Yes sir."

The sheets of paper containing the tabulated list of 301 names of male members of Omaha Tribe of Indians who were over 21 years of age January, 1912, are offered in evidence as Exhibit 40, and are as follows:

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| "1. Thomas Baxter. | 21. Silver Brown. |
| 2. Samuel Baxter. | 22. John Brown, Jr. |
| 3. Burt Baxter. | 23. John Clay. |
| 104 | |
| 4. Charles Baxter. | 24. Francis Cyon. |
| 5. Harry Baxter. | 25. Lee Cyon. |
| 6. Fred Baxter. | 26. William P. Callon. |
| 7. Ellis Blackbird. | 27. Frank Cox. |
| 8. James Blackbird. | 28. David Cox. |
| 9. Henika Blackbird. | 29. Jesse Cox. |
| 10. Peter Blackbird. | 30. John Clark. |
| 11. John Blackbird. | 31. Antoine Cabney. |
| 12. Alfred Blackbird. | 32. Thomas Cabney. |
| 13. Walter Blackbird. | 33. Francis Cabney. |
| 14. George Blackbird. | 34. Reuben Cabney. |
| 15. Henry Blackbird. | 35. William Campbell. |
| 16. Harry Blackbird. | 36. Hiram Chase. |
| 17. Wa-ne Burt. | 37. Thurman Chase. |
| 18. Eleorn Black. | 38. David Camby. |
| 19. Alex Black. | 39. Edward Cline. |
| 20. John Brown. | 40. Warren Davis. |

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|-------------------------|-------------------------|
| 41. Roth Dixon. | 90. Henry Harlan. |
| 42. Arthur Dale. | 91. Elwood Harlan. |
| 43. James Dick. | 92. Grover Harlan. |
| 44. Louis Dick. | 93. Reuben Harlan. |
| 45. Tecumseh Dick. | 94. Robert Harlan. |
| 46. Joseph Dick. | 95. Joseph Hamilton. |
| 47. Mitchell Dick. | 96. Walter Hamilton. |
| 48. George Dick. | 97. William Henika. |
| 49. Herbert Duvall. | 98. Larry Hogan. |
| 50. Edward Esau. | 99. Upton Henderson. |
| 105 | |
| 51. Albert Esau. | 100. Charles Henderson. |
| 52. John Edwards. | 101. Henry Henderson. |
| 53. Yellow Fox. | 102. Simon Hallowell. |
| 54. George Fox. | 103. Thomas Hallowell. |
| 55. Frank Fox. | 104. Alfred Hallowell. |
| 56. Thomas Fremont. | 105. Silas Hallowell. |
| 57. Logan Fremont. | 106. Samuel Irwin. |
| 58. Jackson Fremont. | 107. Horace Kemp. |
| 59. Francis Fremont. | 108. Edward Kemp. |
| 60. Burton Fremont. | 109. Samuel Kemp. |
| 61. Paul Fremont. | 110. Fred Kemp. |
| 62. Hiram Fremont. | 111. Robert Lewis. |
| 63. Eugene Fontenelle. | 112. Fred Lewis. |
| 64. Cecil Fontenelle. | 113. Herbert Lampson. |
| 65. Caryl Farley. | 114. Amos Lamson. |
| 66. John Farley. | 115. Levi Levering. |
| 67. Louis La F. Farley. | 116. Milton Levering. |
| 68. James Fields. | 117. Frank Leeming. |
| 69. Charles Fields. | 118. Andrew Lieb. |
| 70. George Fields. | 119. Silas Lieb. |
| 71. Oliver Furnas. | 120. George Lieb. |
| 72. Henry Furnas. | 121. Frank La Flesche. |
| 73. William Frost. | 122. Cerey La Flesche. |
| 74. Samuel Gilpin. | 123. Noah La Flesche. |
| 75. James Gilpin. | 124. Harry Lyon. |
| 76. Henry Guitar. | 125. Nicholas Lyon. |
| 77. Charles Guitar. | 126. Joseph Lyon. |
| 78. Frank Grant. | 127. John J. Lyon. |
| 79. Walter Grant. | 128. John Lyon. |
| 80. John F. Grant. | 129. Andrew Lyon. |
| 81. Chas. C. Grant. | 130. Don Lyon. |
| 82. Morgan Grant. | 131. Davis Lovejoy. |
| 83. Charles Grant. | 132. Noah Lovejoy. |
| 84. John U. Grant. | 133. Paul Lovejoy. |
| 85. Willie Grant. | 134. Henry Lovejoy. |
| 86. Rice Grant. | 135. Phillip Moore. |
| 87. Sam Grant. | 136. Jesse Morris. |
| 88. James Grant. | 137. James Morris. |
| 89. Richard Hastings. | 138. David Morris. |

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| 139. Henry Morris. | 189. Cyrus Phillips. |
| 140. John Morris, Jr. | 190. Charles Phillips. |
| 141. John G. Morris. | 191. George Phillips. |
| 142. Edward Morris. | 192. Jacob Parker. |
| 143. Chas. Morris. | 193. Benjamin Parker. |
| 144. Morgan Morris. | 194. Daniel Parker. |
| 145. Garry P. Meyers. | 195. Samuel Parker. |
| 146. Albert Morgan. | 196. Henry Parker. |
| 147. Arthur Mitchell. | 197. Charles H. Parker. |
| 148. Thomas Mitchell. | 198. Allan Peabody. |
| 149. Oscar Mitchell. | 199. Walter Peabody. |
| 150. Robert Mitchell. | 200. Charles Peabody. |
| 151. Orin Mitchell. | 201. Arthur Ramsey. |
| 152. Hiram Mitchell. | 202. George Ramsey. |
| 153. Burt Mitchell. | 203. Richard Robinson. |
| 154. Amos Mitchell. | 204. Charles Robinson. |
| 155. Neal Mitchell. | 205. Furnas Robinson. |
| 156. Thomas McCauley. | 206. Louis Robinson. |
| 157. Jeremiah McCauley. | 207. Edward Robinson. |
| 158. Alfred McCauley. | 208. Richard Rush. |
| 159. Rex McCauley. | 209. Gilbert Rush. |
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| 160. Silas McCauley. | 210. Isaac Stabler. |
| 161. Theodore McCauley. | 211. Guy Stabler. |
| 162. Isaac McCauley. | 212. Roy Stabler. |
| 163. George Miller. | 213. Simon Stabler. |
| 164. Wallace Miller. | 214. George Stabler. |
| 165. John Miller. | 215. James Stabler. |
| 166. Edward Miller. | 216. Edward Stabler. |
| 167. Benjamin Merrick. | 217. Robert Smith. |
| 168. Paul Merrick. | 218. Harry Solomon. |
| 169. Frederick Merrick. | 219. Andrew Solomon. |
| 170. George Merrick. | 220. Thomas L. Sloan. |
| 171. Daniel Merrick. | 221. Dwight Sherman. |
| 172. Ernest Merrick. | 222. Edward Sherman. |
| 173. Louis Neal. | 223. Isaac Sherman. |
| 174. Jacob Penn. | 224. William Sherman. |
| 175. David Preston. | 225. Frank Saunsoei. |
| 176. Isaac Preston. | 226. Ardent Saunsoei. |
| 177. Albert Preston. | 227. Parrish Saunsoei. |
| 178. Little Deer Preston. | 228. Mitchell Saunsoei. |
| 179. Daniel Porter. | 229. Bennie Saunsoei. |
| 180. Phillip Porter. | 230. Louis Saunsoei. |
| 181. James Porter. | 231. Toney Saunsoei. |
| 182. Eugene Pappan. | 232. John Springer. |
| 183. Albert Pappan. | 233. Wallace Springer. |
| 184. William Provost, Jr. | 234. William F. Springer. |
| 185. Howard Provost. | 235. Henry Springer. |
| 186. Arthur Provost. | 236. Louis Springer. |
| 187. Charles Pilcher. | 237. Charles Springer. |
| 188. William Pilcher. | 238. John Sheridan. |

239. Phillip Sheridan.	271. Ansley White.
240. Clyde Sheridan.	272. Thomas White.
241. Louis Sheridan.	273. Frank White.
242. William Thomas.	274. Spafford Woodhull.
243. Charles Thomas.	275. Charles Woodhull.
244. Theodore Thomas.	276. George Woodhull.
245. Paul Thomas.	277. Solomon Woodhull.
246. Matthew Tyndall.	278. Louis Woodhull.
247. Frank Tyndall.	279. John Wood.
248. Joel Tyndall.	280. James Wood.
249. Walter Tyndall.	281. Charles Wood.
250. Christopher Tyndall.	282. Silas Wood.
251. Amos Walker.	283. Robert Warner.
252. Phillip Walker.	284. Harvey Warner.
253. Edwin Walker.	285. David Wells.
254. Homer Walker.	286. David B. Wells.
255. Horace Walker.	287. Charles Wells.
256. William Walker.	288. Edward Wells.
257. Clyde Walker.	289. Pollock Wells.
258. James Walker.	290. Daniel Wolf.
259. Harry Walker.	291. Oliver Wolf.
260. Daniel Walker.	292. Charles Wolf.
261. Benjamin Walker.	293. Ray Wolf.
262. Stewart Walker.	294. Thomas Wolf.
263. Thomas Walker.	295. Thomas Wolf.
264. Daniel Webster.	296. John Wolf.
265. Thomas P. Webster.	297. Jackson Wolf.
266. William Webster.	298. Edward Wolf.
267. Noah Webster.	299. Jefferson Wolf.
268. Thomas C. Webster.	300. James Wolf.
269. Peter Webster.	301. Luther Wolf."
270. Louis Webster.	

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When I signed my name among the list of names now attached to Exhibit 34, the petition which precedes the names was not then attached to that paper and I never saw that purported petition until it was in the Court room.

I never knowingly signed a petition requesting the sale of the unallotted lands of the Omaha Indian Reservation to be transmitted to the Indian Department, and I was never in favor of the sale of the unallotted lands. I heard there was a meeting January 24, 1912, but I did not attend it.

Cross-examination:

I have been in the real estate business for about 3 years at Walthill from 1909 to 1912. I am three-fourths Indian blood. My father was a full blood Indian. I made up the list of names which are written on Exhibit 36.

Hiram Walker is an Indian but is a Chippewa. He married an Omaha Indian woman and has children born since March 3, 1893.

W. T. Diddock married Marguerite La Flesche, an Indian woman. Oscar Sedig is a full blood white man and was married to my sister and they did have children who are members of the tribe. Clara S. Hogan, now deceased, was the wife of James Hogan, who was not an Indian. They had five children and the family excepting James Hogan were members of the tribe. Susan La Flesche Picotte in January, 1912, was the head of a family, her husband being dead, and she is now dead. There were two children of that family living January 24, 1912. All the persons whose names appear on Exhibit 38 were members of Omaha Tribe of Indians. I think it was Caryl Farley who brought me the paper which I signed which was the original of Exhibit 34. When I signed it I supposed it was a tabulated list,—census. They do sometimes go around and get the Indians to sign their names in taking a census. I suppose if he wanted a correct list up to date he would have to go around and check it up. Rolls at the Agency do not always carry the ages of the children.

I do not recall the talk between Mr. Farley and myself at the time I signed the paper. I think I signed it at Walthill late in 108 the fall of 1908, or in the spring of 1909. When I signed my name there was nothing at the head of the pages to read, only the place to sign my name. The names which appear on that sheet before my name appears had already been written there. Grace Springer is my wife.

Redirect examination :

When I made up the list of the male members of the Omaha tribe of Indians, Exhibit 40, I had Alfred Hallowell, Mrs. Minnie Hamilton, Hiram Chase and Mr. Brownrigg help me. It was first written down with pen and ink and afterward copied by a typewriter.

Mrs. GRACE SPRINGER testified for the plaintiffs in rebuttal :

I am the wife of William F. Springer, and a member of the Omaha Tribe of Indians. When I signed Exhibit 34, it was a single sheet of paper. At that time, no petition was attached to it asking the United States to pass a law to sell Omaha Indian unallotted lands."

When I signed that paper, I did not know that I was signing a petition to have the Government sell the Omaha Indian Reservation. I was never in favor of selling the Omaha Indian lands. I remember signing the paper. Whoever presented it said they wanted the number of children that were not allotted lands but I cannot remember who presented the paper.

Mrs. MINNIE HAMILTON testified for the plaintiffs in rebuttal :

I assisted Mr. Springer and others in making up the list of male members of the Omaha tribe of Indians who were over 21 years of age in January, 1912, being Exhibit 40. I personally know all the persons whose names are put down on said list aggregating 301 who were male members of Omaha tribe of Indians in 1912. So far as my knowledge and acquaintance goes, said list is correct.

There were about the same number of women members of the tribe as there were of the men. The total number of members of the tribe in 1912 was about 1200.

Cross-examination:

I am one half Indian blood and a member of Omaha tribe of Indians. John Pilcher is my ancestor. Mrs. Grace Springer is my sister.

109 The 301 names on Exhibit 40 may not be all of the male members of the tribe living at that time. So far as that list is made up it is correct. There may have been more but that list contains all that we thought of at the time and they are still living.

I have lived on the Reservation nearly all my life and am 53 years old.

HIRAM CHASE testified for the plaintiffs: I am a member of Omaha Tribe of Indians and was president of the Omaha tribe about the year 1909. I looked over the list of the Omaha tribe of Indians, being Exhibit 40, who were voters in 1912, and came to the conclusion that it was a correct list. I know those Indians personally.

"Q. You may state whether or not as a matter of fact in 1909 or prior thereto whether there was not an effort made before certain meetings of the Omaha tribe of Indians to have the tribe agree that such sale of the unallotted lands should be made?

A. Yes sir.

Q. Now, with what result was it brought to a vote of the tribe?

A. There was several council meetings held with reference to this matter, but no conclusion was reached, the sentiment then being for the division of the land."

"Q. What do you mean by division of the land, you mean of the land among the Indians?

A. Yes, allotments.

"[—.] While President of the Council did you yourself write a letter to the President of the United States under date of February 11, 1909?

A. I did."

The letter shown the witness is introduced in evidence as Exhibit 41 and reads as follows:

"Pender, Nebraska, Feb. 11th, 1909.

Mr. Theodore Roosevelt,
The President of the United States,
Washington, D. C.

SIR:

As a member and the president of the Omaha Tribe of Indians of Nebraska, it becomes my duty to apprise you that behind the specious argument of the proponents of a bill to be passed by Congress providing for a sale of the tribal lands of the Omaha Tribe of In-

dians (as reported in the newspapers a copy of which is hereto
110 attached) ; that it is better to sell these lands and the proceeds
divided among the children of the tribe who have no allot-
ments; that a townsite be laid out for the tribe; and that the old
Mission (now already denuded of its valuable lumber to embellish
the homes of favorites; and now practically demolished in its worth
as a Historical structure), be given over to the Nebraska Historical
Society, in all and in every respect but a hidden and fraudulent
[schemes] of John M. Commons, the Indian Agent, backed by a gang
of grafters and speculators who surround him, and practically run our
tribal affairs. This nefarious scheme of the Indian Agent and his
followers if carried out will: (1) Deprive and defraud 150 children
of our tribe of vested right to be allotted 80 acres each of 12,000
acres of our tribal lands secured for them under existing laws of
Congress.

(2) It will force these children to give up their rights to the allot-
ments of these lands, to be sold to speculators who have full swing in
our affairs, and are under the special care of our Indian Agent in
their schemes.

(3) That under the proposed law to be passed, the scheme is to
beat and defraud 150 children of their rights to allotments of our
tribal lands as aforesaid, and sell these lands and compel these chil-
dren to divide the proceeds with 250 other children of the tribe who
cannot by any possibility have any rights in the premises, by reason
of existing acts of Congress and existing conditions.

Mr. President, the proposed scheme to sell our tribal lands and di-
vest the 150 children of our tribe of their rights to be allotted these
lands was never the dream of our tribe. And it was in violation of
our constitution and system of deliberating and settling all of our
tribal affairs, that John M. Commons under color of his authority, as
Indian Agent, backed by grafters and speculators that he called
several meetings in which his schemes were defeated in every in-
stance by the tribe.

After failing to induce the tribe to acquiesce in his scheme then
said John M. Commons and his followers resorted to the unlawful
means of approaching members of our tribe at their homes and singly
and not in council, and by false representations and undue influence
induced them to sign petitions etc. addressed to the authorities at
Washington, D. C., asking for the sale of our tribal lands. And it is
absolutely untrue and false that the scheme in question
111 'meets the wishes of a majority of the tribe, as expressed in
open council, as reported by the newspapers.

Mr. President, the particular point which I desire to bring to your
attention is, that Congress has already appropriated these tribal
lands for the benefit of our children who may be born during the
period of trust of 25 years not as yet expired, in which the Govern-
ment was to hold our tribal lands for the benefit of our children to
be born during said period. (See Section 8 Act of Congress Aug.
7, 1882, Vol. 22 U. S. Statutes at Large, p. 341; and the amendatory

act thereof of Mar. 3, 1893, in Vol. 27, U. S. Statutes at Large, page 630.)

Under these acts of Congress we contend that our children who have no allotments, and were born during the period of trust of 25 years of our tribal lands, and now living, have an absolute and vested right to be allotted these tribal lands, and that they cannot be divested of their said rights by further legislation. And that if a measure of Congress be passed to divest these children of their said rights, it would be taking away from them rights without their consent and without due process of law and that such a law would be void and unconstitutional and would not affect the rights of these children granted them by a previous [acts] of Congress.

Mr. President, in the allotment of our tribal lands, grievous errors have been made by allotting agents sent among us to allot our lands, among which errors is the allotment of our tribal lands to dead persons, without authority of law, and on the plain reason of the thing, that a grant or allotment cannot be made to a person who has no existence, and is illegal and void.

If these errors are [correct-] by the Interior Department, there will be about 12,000 acres of tribal lands subject to an allotment to children of our tribe born during the period of trust of 25 years, and now living. While it is true that the quantity of said tribal lands of 12,000 acres is inadequate to give an allotment of 80 acres each to about 400 children now without allotments, I have the opinion of General John C. Cowin, an eminent lawyer of Omaha, Nebraska, who sustains our position that nevertheless these tribal lands must be allotted to said children according to their priority of birth until said tribal lands are completely exhausted.

In consequence of which of the 400 children of the tribe
112 who have been born during the period of said trust of 25 years, who have no allotments and are now living, only 150 of the eldest of said children ranging in ages from 16, 15, 14, 13, 12 and 11 years are entitled to an allotment of said tribal lands, and the other 250 by force of circumstances will be without allotments, for the simple reason, that the tribal lands will have been exhausted in the method fixed and pointed out by the wisdom of the act of Congress as specified above, upon this point I quote from General Cowin's opinion the whole of which I herewith transmit a copy for your perusal:

General Cowin says:

'You also state that there is no sufficient amount of unallotted lands in the residuary now held by the tribe to award the amount of allotment to all the children now in the tribe who have received no allotment. It seems to me, however, that the only construction to be placed upon the Act in such a case is that the right of allotment was acquired in priority according to priority of birth. This is on the fact that under the act when a child was born, it became at once entitled to allotment which could be made by the parents.

Of course, as children born since the act of 1893, up to the expiration of the 25 years, are entitled to allotment, if there are any lands subject thereto, such children have the benefit of the act of 1893, and take $\frac{1}{8}$ of a section.

If there are more children than lands, according to allowed allotment, it is unfortunate, of course, for the children unable to receive the benefit. But such a condition must necessarily occur sooner or later. (See opinion of Gen. Cowin submitted.)

Mr. President, in conclusion I earnestly appeal to you as the lawful constituted authority to see that the laws of Congress already made in the premises be faithfully executed in favor of the 150 children entitled to allotments out of the remaining lands of our tribe, and that you protect and defend them against the schemes and frauds of a perfidious Indian agent and a gang of grafters who are seeking to deceive you and the Interior Department in the premises and reap a rich harvest by the sale of our tribal land for speculative purposes, and force these children to give up their rights to allotments, to be sold and the proceeds divided among 250 other children, who cannot by any legal possibility acquire rights in the premises, under the conditions and in consequence of existing laws above mentioned.

113 In order to carry out the provisions of existing laws in the premises, it is respectfully suggested that the President ought to make orders for the Interior Department to correct the error of the allotments made to non-existent and dead persons, and that such lands so allotted be brought back to the status of tribal lands, and then to allot the remaining lands to the amount of about 12,000 acres to each living child having no allotment 80 acres, in accordance to their priority of birth until said tribal lands are exhausted, notwithstanding that some of our younger children must go without allotments because the tribal lands will be so exhausted according to the provisions of existing laws as aforesaid.

Further information on the subject in hand will be gladly furnished.

Very respectfully,
(Signed)

HIRAM CHASE,
President of the Omaha Tribe of Indians of Nebraska."

"Q. Mr. Chase, you may tell me about what were the number of the members of the Omaha tribe of Indians in 1912?

A. In 1912 there was something between 1200 and 1250. My knowledge is based upon a census report, and for, I don't know how many years, it was generally understood that the Omahas numbered to 1250 in census."

"Q. I will go back to the matter that probably belongs in the case in chief, and should have been gone into before; the suit which was brought in behalf of allotment for Hiram Chase, Junior, and for Nellie Hallowell, were two of the original suits brought in this court before I was employed in those cases?

A. And before any move was made to sell these lands.

Q. Now, what I want to get at is, have you, Mr. Chase, the original application for allotment to Hiram Chase, Junior, and to Nellie Hallowell?

A. I have. I did have them and the answer to it from the Secretary of Interior.

Q. Did you transmit the application for the allotments for the

lands described in the petition in those cases to the Interior Department?

A. I did.

Q. And the claims for allotments in behalf of these respective claimants was denied?

A. It was denied by reply letter with my copy.

114 Q. Are you at this time able to produce that application for allotment transmitted to the Department and the reply letter, and if not able to produce them state why?

A. No sir. Since you had this case I had them, and in moving the paper got mislaid and I looked for them and I could not find them anywhere. Either they were destroyed or lost [of] mislaid. I could not find them anywhere."

Cross-examination:

Hiram Chase, Junior, is my son. I am associate attorney in some of these cases and have some relatives who are plaintiffs in some of these suits.

I know Amos Mitchell and may have had a talk with him about preventing the sale of the unallotted lands but "this is the first recollection I have of having any talk about that. I talked with a lot of people about it." "I might have stated to him that I wanted his help if I talked with him." "I thought I would write him a letter" and I said that I wanted their help.

NEBRASKA HALLOWELL testified for plaintiffs in rebuttal: I am known as Alfred Hollowell and as Nebraska Hollowell. Am a member of Omaha Tribe of Indians, and a member of the Council of the Tribe in January, 1912, and was present at the meeting of the Indians January 24, 1912. "There were not quite fifty there at that meeting." "I was one of the opposers of the selling of the land. I saw all that were there." "All those what were opposed I shall call their names, namely, John Springer, Simeon Hollowell, Nebraska Hollowell, Amos Walker, Hiram Chase, Cyrus Blackbird." That means that out of the twelve members of the Council of the tribe "six members of the council were opposed to selling the land."

Q. Now that means that six out of the twelve members of the Council of the Tribe were opposed to the sale of the lands, is that what you mean to say?

A. Yes, six members of the Council were opposed to sell the land.

Q. That means six out of the whole Council which was composed only of 12 members?

A. Yes sir. He said, that whenever they have a meeting some of the members of the Council are not present. We never had a full quorum."

15 Cross-examination:

I am about 62 years old. Hiram Chase's mother was my cousin. Hiram Chase is half white and half Omaha.

The plaintiffs in these allotment suits on file with one or two

exceptions are mixed bloods. The members of the Council who were present at the meeting January 24, 1912, who were opposed to the selling of the land were mainly John Springer, Cyrus Blackbird, Simeon Hallowell, Hiram Chase, Amos Walker, and Nebraska Hallowell. All these persons were members of the Council January 24, 1912. Other members of the Council who were present were Thomas McCauley and I think Harry Lyon and Amos Mitchell. I must state that I could not remember the names of all because it was quite a while ago. I remember that McCauley, Webster and La Flesche were elected delegates at that meeting and left for Washington on the business entrusted to them.

Additional Testimony for Defendants.

CARYL E. FARLEY, recalled for the United States, testified:

When William F. Springer and Grace Springer signed their names to the petition the heading was attached thereto. John Springer was not a member of the Council on January 24, 1912, as I remember it. Hiram Chase was not a member of the Council January 24th, as I remember. Amos Mitchell was not a member of the Council and had not been for two or possibly three years.

Cross-examination:

I always thought there was a record kept of the election of the members of the Council, "but it seems as though it has been stolen or lost." As I understand it, the President and Secretary of the Council had to certify who the new members were that were elected. This certificate was supposed to be delivered to the Indian Agent. I think Mr. Neale was the Agent who would have the custody of that paper and when he went out of office it would be delivered to his successor.

Mr. E. J. Bost is the present Superintendent. I know as a fact that Hiram Chase was a member of the Council at one time but he was not at the time of the meeting January 24, 1912. I would not say whether Hiram Chase was President of the Council
116 for a number of years. "I know he was one of the prominent members of the Council. I know that Alfred Hallowell was a member of the Council.

Redirect examination:

I have made an effort to find the minutes of the Omaha Council. Mr. Levi Levering said he had given the Council book to Mr. Chase upon Mr. Chase's request and it never had been returned to him. The Council book referred to was the Council book prior to January 24, 1912. I have made search to ascertain the Council minutes of the meeting of January 24, 1912.

AMOS MITCHELL testified for the United States:

I was not a member of the Council of the Omaha Tribe of Indians in January 1912. I became a member of the Council just after that. I mean I have been a member of the Council for three years past and prior to that I was not a member of the Council.

LOUIS DICK testified for the United States:

John Springer was not a member of the Council January 24, 1912. Hiram Chase was not a member of the Council at that time. Amos Mitchell was not a member of the Council at that time. The members of the Council at that time were Noah La Flesche, Jacob Parker, Harry Lyon, Thomas McCauley, Ardent Saunsoci, Richard Robinson, Henry Morris, Bert Fremont, Alfred Blackbird, Amos Walker, Simeon Hallowell and Nebraska Hallowell.

Cross-examination:

I am not a common policeman. "I am Chief of Police."

"Q. You was Chief of Police?"

A. Yes, sir.

Q. How many policemen have you up there?

A. Just one.

Q. You was that fellow and also the Chief?

A. Yes sir."

(Stipulation as to Transcript of Evidence.)

It is hereby stipulated and agreed by and between the attorneys for the respective parties that the foregoing transcript of the evidence sets forth correctly in narrative form the evidence introduced by the respective parties, except there is omitted therefrom that
117 part of the evidence which was introduced relating to hand-writing of signatures of Indians and as to forged signatures for the reason that the same is regarded as immaterial and no assignment of errors relates thereto.

JOHN LEE WEBSTER,
Attorney for Plaintiffs.

T. S. ALLEN,
U. S. Attorney,

HOWARD SAXTON,
*Ast. U. S. Attorney,
For Defendant.*

(Certificate of Judge to Statement of Evidence.)

I, the undersigned, do hereby certify that the foregoing transcript of the evidence recited in narrative form is a correct transcript of the evidence so set forth in narrative form which was introduced by the respective parties in the foregoing entitled cases.

Witness my hand this the 16th day of September, 1918.

J. W. WOODROUGH,
Judge.

Filed September 21, 1918, R. C. Hoyt, Clerk.

(Clerk's Certificate to Transcript.)

DISTRICT OF NEBRASKA, ss:

I, R. C. Hoyt, Clerk of the District Court of the United States within and for the District of Nebraska, hereby certify that pursuant to the order of court and in compliance with the Precipe, a copy of which is found on page 39 hereof, the foregoing record has been made, and that the same is a true and faithful transcript of the pleadings and proceedings on file and of record in said Court in the case of Hiram Chase Jr., a minor, by his next friend Hiram Chase, vs. United States of America, Case No. 811 Docket "Z".

That a copy of the Citation duly certified has been lodged
118 and remains in my office as such Clerk.

Witness my hand and the seal of said Court at Omaha in said District this 27th day of September, A. D. 1918.

[Seal U. S. Dist. Court, Dist. of Nebraska, Omaha Division.]

R. C. HOYT,

Clerk,

By JOHN NICHOLSON,

Deputy.

Filed Sep. 30, 1918 E. E. Koch, Clerk.

119 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5283.

HIRAM CHASE, JR., Minor, by His Next Friend, HIRAM CHASE,
Appellant,

vs.

UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Appellant.

JOHN LEE WEBSTER.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 5, 1918.

(*Appearance of Mr. T. S. Allen and Mr. Howard Saxton as Counsel for Appellee.*)

The Clerk will enter my appearance as Counsel for the Appellee.

T. S. ALLEN,
United States Att'y.
HOWARD SAXTON,
Asst U. S. Att'y.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 23, 1918.

120 (*Appearance of Mr. O. C. Anderson as Counsel for Appellee.*)

The Clerk will enter my appearance as Counsel for the Appellee.

O. C. ANDERSON,
Att'y for Omaha Tribe of Indians.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 30, 1919.

(Order of Submission.)

September Term, 1919.

Thursday, September 4, 1919.

No. 5283.

HIRAM CHASE, JR., a Minor, etc., Appellant,

VS.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the District of Nebraska.

No. 5284.

MARY GILPIN, a Minor, etc., Appellant,

VS.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the District of Nebraska.

and

No. 5320.

THOMAS BUTLER, Appellant,

VS.

UNITED STATES OF AMERICA et al.

Appeal from the District Court of the United States for the District of Nebraska.

121 These causes, Nos. 5283, 5284 and 5320, having been called for hearing in their regular order, reargument was commenced by Mr. John Lee Webster for the appellants Chase and Gilpin in Nos. 5283 and 5284, and for the appellee Hollowell in No. 5320; continued by Mr. T. S. Allen, United States Attorney, and concluded by Mr. O. C. Anderson, Attorney for the Omaha Tribe of Indians, for the United States of America in each of the cases.

Thereupon, these causes were submitted to the Court on the transcripts of the records from said District Court and the briefs of counsel filed herein.

122

(Opinion.)

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1919.

No. 5283.

HIRAM CHASE, JR., a Minor, by His Next Friend, HIRAM CHASE,
Appellant,

VS.

UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the United States for the District of Nebraska.

Mr. John Lee Webster (Mr. Hiram Chase was with him on the brief), for appellant.

Mr. T. S. Allen, United States Attorney, and Mr. O. C. Anderson, Attorney for Omaha Tribe of Indians (Mr. Frank A. Peterson, Assistant United States Attorney, was with them on the brief), for appellee.

Before Carland and Stone, Circuit Judges, and Elliott, District Judge.

CARLAND, *Circuit Judge*, delivered the opinion of the Court:

May 19, 1910, this action was instituted under the provisions of the act of Congress approved February 6th, 1901, (31 Stat. 760) by Hiram Chase, Jr., a member of the Omaha Tribe of Indians, by his next friend, Hiram Chase, Sr., to secure a decree for an allotment of land in the Omaha reservation which had been denied to him by the Secretary of the Interior. The case was before this court at a former term and as stated in the opinion of the court on appeal from a decree dismissing the amended complaint for the reason that it did not state facts sufficient to constitute a cause of action. We then decided that the amended complaint did state a cause of action under the act of Congress of August 7th, 1882, (22 Stat. 341) 238 Fed. 887. When the case went back to the trial court, the appellee answered alleging among other things the acts of Congress of March 3rd, 1893 (27 Stat. 630) and May 11th, 1912, (37 Stat. 111) as repealing the act of 1882, so far as the right of Chase, Jr., to an allotment was concerned. After a trial on the merits, a decree of dismissal of the action was entered and appellant appealed. As our former decision gave Chase, Jr., no right to an allotment under the act of March 3rd 1893, but expressly decided that he was not entitled to an allotment under said act and that it did not repeal the act of 1882, it need not be mentioned except perhaps in a historical way. We also decided that Hiram Chase, Jr., was entitled to an allotment of forty acres under the act of 1882 *supra*. The question therefore be-

time as is as to whether the act of May 11th, 1892, *supra*, took away the right of Chase, Jr., to an allotment under the act of 1882. The act of 1892 provided for the sale of that portion of the Omaha reservation lying west of the Sioux City and Nebraska Railway and the allotment in severalty to the Indians of that portion of the reservation lying east of said railway in quantity as follows: to each head of a family one-quarter of a section, to each single person over eighteen years of age one-eighth of a section, to each orphan child under eighteen years of age one-eighth of a section, and to each other person under eighteen years of age one-sixteenth of a section. The act further provided that the Secretary of the Interior should cause patents to be issued for said allotments in the names of the allottees, which patents should be of the legal effect and declare that the United States held the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotments had been made. These allotments were made in 1894. Section 5 of the act of 1892 reads as follows:

"That the residue of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all incumbrance whatsoever. Provided, That from the

residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in Section 6 of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common. And, provided further, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe."

Chase, Jr., was born December 3, 1895. Hiram Chase, Sr., testified that he transmitted to the Secretary of the Interior an application for an allotment for the land described in the complaint; that said application was denied; that witness was not able to produce said application nor the letter written him in reply thereto; that said papers had been lost or mislaid. The trust period mentioned in the act of 1882 expired in 1909. In the absence of other legislation it therefore appears that Chase, Jr., was within the terms of the act of 1882 allowing allotments to Omaha children born during the

trust period. We proceed therefore to consider the question heretofore stated as being the question for decision. The act of 1912, *supra*, reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, if necessary, and appraised, in such manner as he may direct, in tracts of forty acres each, or as nearly as to the Secretary may seem practicable, and, after such survey and appraisement, to sell and convey, in quantities not to exceed one hundred and sixty acres to any one purchaser, all the unallotted lands on the Omaha Indian Reservation, in the State of Nebraska, except such tracts as are hereinafter specifically reserved; Provided, that the said land shall be sold to the highest bidder under such regulations as the Secretary of the Interior may prescribe, but no part of said land shall be sold at less than the appraised value thereof; And provided further, that prior to such appraisement and sale any member of the Omaha Tribe whose allotment is subject to erosion by the Missouri River shall be permitted to relinquish such allotment, and select in lieu lands of equal area from the unallotted lands, the lands so relinquished to become a part of the unallotted tribal lands and subject to appraisement and sale under the terms of this act.

"Sec. 2. That the Secretary of the Interior is hereby directed to reserve from sale, under the terms of this act, the following tracts of land for the purposes designated: forty-nine acres of the land now used for agency purposes to be reserved for agency and school purposes for so long as the need thereof exists; ten acres to be selected by the tribe for use as a tribal cemetery; ten acres of the land now reserved for the use of the Presbyterian Church to be selected by the officials of said church for the use of the church so long as needed for religious or educational purposes; two acres of the land on which is standing what is known as the old Presbyterian mission building, and the Secretary of the Interior is hereby authorized to cause a patent in fee simple to issue therefor in the name of the State Historical Society of Nebraska; Provided, that of the land now reserved for agency purposes the Secretary of the Interior is directed to reserve and set aside for townsite purposes one hundred and sixty-four acres other than the forty-nine acres hereinbefore reserved, and shall cause the same to be surveyed and platted into town lots, streets, alleys and parks, the lots to be appraised and sold under the terms of this act, and the streets, alleys and parks are hereby dedicated to public use; Provided further, that the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or otherwise disposed of, shall be subject for a period of twenty-five years to all of the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

"Sec. 3. That the proceeds of such sale, after paying all the expenses incident to and necessary for carrying out the provisions of this act, and after reimbursing the general trust fund of the tribe

for any assessment paid therefrom for protecting the unallotted tribal lands from overflow, shall be divided pro rata among the children of the Omaha Tribe living on the date of the passage and approval of this Act who have not received allotments of land
 126 under the Acts of August seventh, eighteen hundred and eighty-two (twenty-second United States Statutes at Large, page three hundred and forty-one) and March third, eighteen hundred and ninety-three (twenty-third United States Statutes at Large, page six hundred and thirty), and shall be expended for the benefit of said Indians when and in such manner as in the opinion of the Secretary of the Interior shall be to their best interests, and pending such expenditure by the said Secretary the sums due the respective Indians shall be placed to the credit of the said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, but in the event of the death of such Indian while there remains in the Treasury to his credit any part of the sum so deposited the said sum shall be paid at once to his heirs, who shall be determined by the Secretary of the Interior in accordance with the laws of descent in force in the State of Nebraska, and the action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

"Sec. 4. That for the purpose of carrying out the provisions of this act there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of three thousand dollars, or so much thereof as may be necessary, to be reimbursable out of the funds arising from the sale of said lands."

It appears on the record that no allotment of land was ever made to children born during the trust period under the act of 1882. The title of the Omaha Tribe of Indians and the individual members thereof in the unallotted lands mentioned in Section 8 of the act of 1882 was merely one of occupancy or possession. *United States v. Chase*, 245 U. S. 89. From a reading of the act of 1912, it clearly appears in our opinion, that the act deals wholly and completely with the unallotted lands referred to in Section 8 of the act of 1882. There is no repealing clause in the act, but we are of the opinion, that it is so far repugnant to and covers so completely the subject of the disposition of the unallotted lands of the Omaha reservation, that it must be held to have repealed that portion of the act of 1882 which authorized allotments to Omaha children during the trust period. The act of 1912 comes within the rule that where two or
 127 more acts are passed and the latter act whether in the form of an amendment or otherwise covers the whole subject matter of the former and is inconsistent with it and evidently intended to supersede and take the place of it, repeals the former law. *U. S. v. Tynen*, 11 Wall. 88; *King v. Cornell*, 106 U. S. 395; *Murphy v. Utter*, 186 U. S. 95, 105; *The Paquette Habana*, 175 U. S. 677, 685; *Ency. U. S. Reports*, Vol. 11, Page 98; 36 Cyc. 1082; *Minn. Impr. Co. v. Billings*, 11 Fed. 972.

The Secretary of the Interior of course could not allot the unallotted lands under the act of 1882 and also sell them under the act of 1912, nor could he allot the unallotted lands and at the same time

make the reservations which he is commanded to make by Section 2 of the latter act. It is so plain that both acts cannot be carried out that it is unnecessary to discuss that question. It is claimed however by counsel for appellant that the Secretary of the Interior is simply "authorized" to cause the unallotted lands to be surveyed and sold and make the reservations prescribed in Section 2 and therefore it is discretionary with him whether he will perform the duty imposed upon him by the act or not, and that hitherto he has not acted. We are of the opinion that the non-action of the Secretary is fully explained by the pendency of this suit and about twenty others like it since the act of 1912 was passed. An examination of the legislation of Congress shows that in many of the acts of Congress the word "authorized" is frequently used where a duty is imposed upon a public executive officer and in no case are the duties imposed discretionary unless after the word "authorized," the other words "in his discretion" are added. As was said by the Supreme Court of the United States in *Mason et al. v. Fearson*, 9th How. 258, "Whenever it is provided that a corporation or officer 'may' act in a certain way, or it 'shall be lawful' for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons. * * * Without going into more details, these cases fully sustain the doctrine, that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the legislature, which is the test in these cases, seems under such circumstances to have been 'to impose a positive and absolute duty.'" The Mayor of New York v. *Furre*, 3 Hill 612; *Minor et al. v. The Mechanics Bank of Alexandria*, 1 Pet. (U. S.) 46, 64 and note; *Livingston v. Tunner*, 14 N. Y. 64; *Ralston v. Crittenden*, 13 Fed. 508; *Supervisors Rock Island County v. U. S.*, 4 Wall. 435. It appears that the word "authorized" is used in the acts of 1882 and 1893, and in the act of 1882 in almost the identical language of the act of 1912. Of course we must presume that the act of 1912 was passed for the benefit of the Indians and we are entirely within the facts shown by the record when we say that the act was the result of years of perplexity and negotiations between the Secretary of the Interior and those Indians who were interested in the unallotted lands of the Omaha tribe. The case of *Frost v. Wenie*, 157 U. S. 46, and *U. S. v. Hemmer et al.*, 241 U. S. 397, are not in point.

Chase, Jr., never obtained a vested interest in the unallotted lands of the Omaha tribe under any law and Congress had plenary power to at any time change the mode of disposition of these unallotted lands. *Head Money Cases*, 112 U. S. 580; *Eddy v. Robertson*, 124 U. S. 190; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; *Lone Wolf v. Hitchcock*, 187 U. S. 557; *Sizmore v. Brady*, 235 U. S. 441; *Cherokee Intermarriage Cases*, 203 U. S. 76; *Wallace v. Adams*, 204 U. S. 415; *Stevens v. Cherokee Nation*, 174 U. S. 445; *Choate v. Trapp*, 224 U. S. 665. If we should concede that Chase, Jr. had a floating right in the unallotted lands that right did not attach to a particular tract of land until such tract of land had been definitely

located, selected and set apart to the allottee. *Woodbury v. U. S.*, 170 Fed. 302; *Smith v. Bonifer*, 138 Fed. 889; *Hy-wu-tsi-mil-kin v. Smith*, 194 U. S. 553; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; *U. S. v. Kagama*, 118 U. S. 375; *Gritts v. Fisher*, 224 U. S. 640, and many other authorities that might be cited.

The result that would follow a decision by us that the act of 1912 was of no force or effect must be considered. It appears that besides the present suit there are about eighty-three other plaintiffs whose suits are now pending in the court below, all of whom have made their selections for allotments and instituted their suits against the United States subsequent to the passage and approval of the act of May 11th, 1912, and if they are entitled to these allotments regardless of the act of 1912, it would amount to a repeal thereof by this court, as the land claimed by these various plaintiffs practically takes up all the unallotted tribal lands. It appears also that 129 upon the lands mentioned in Section 2 of the act of 1912, are located the government buildings described therein, also a large Presbyterian church, Presbyterian mission building, also a cemetery wherein the Indians have buried their dead for many years. Moreover, to rule in favor of the plaintiff in this action would be to decide contrary to the construction placed upon these laws for many years by the executive officers of the United States charged with their execution. While their construction is not conclusive it is entitled to much weight. This proposition is supported by a large number of decisions of the Supreme Court of the United States.

It is contended however that conceding for the sake of argument what we have said in reference to the act of 1912, is true, the appellee is not in a position at this time to set up that act as a defense for the following reasons: (a) The decision of this court in *Chase v. United States*, supra, that appellant was entitled to an allotment under the act of 1882, as amended by the act of 1893, is the law of this case and the District Court had no authority to hold otherwise. (b) That the Department of Justice was fully advised of the act of 1912 at the time of the original hearing of the case and did not either in trial court or in this court contend or claim that said act repealed the act of 1882, therefore appellee is now estopped from changing its position by pleading the act of 1912. In considering these contentions it is necessary to look at the record as it stood on the former appeal. The record on this appeal does not show that the amended complaint was ever attacked as a pleading. It does show that a general demurrer was filed to the original complaint September 8, 1910, and sustained by the District Court October 2, 1911. It does not show that the complaint either original or amended, or the action itself was ever dismissed. Turning to the opinion of this court on the former appeal we find the recital, "The United States appeared in due time and moved to dismiss the bill, on the ground that its allegations were not sufficient to constitute a cause of action. This motion was sustained, and, plaintiff declining to plead further, the bill was dismissed." We therefore

conclude that the record on the former appeal did show that the bill or complaint was dismissed as stated. The appellant in his amended complaint with the treaties of March 16, 1854, 10 Stat. 1043, and March 6, 1865, 14 Stat. 667, as a background pleaded his right to an allotment under the act of 1882, and also pleaded the act of 1893, stating his view as to the proper construction of the latter act. The act of 1912, was not mentioned in the complaint. Appellee in his motion to dismiss insisted that the complaint did not state a cause of action. The trial court adopted this view. On appeal this court decided that the trial court was in error in that under the facts pleaded appellant was entitled to an allotment under the act of 1882 and reversed the case. The appellee had pleaded nothing except as stated. The question for decision therefore on the former appeal was necessarily confined to the allegations of the complaint. Appellee contended on the former appeal that the act of 1893, and which appellant pleaded repealed the act of 1882, and made no other contention. It is thus made clear that this court on the former appeal so far as the record shows did not consider the effect of the act of 1912, nor was it called to the attention of the court as conclusively appears from its opinion, and the briefs of counsel. The judgment on the former appeal being one of reversal the rule as stated in *Mutual Life Insurance Co. v. Hill*, 193 U. S. 553, applies. It was there stated:

"Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the record and have not already been decided are open for consideration." See also, in *re Fork & Tool Co.*, 160 U. S. 248; *Ex parte Union Steam Boat Co.*, 178 U. S. 317.

The question has been decided the same way by this court. The court said:

"Only those issues of law which were before the appellate court and by it determined become the law of the case, when, upon reversal, the cause is retried." *Iowa Central Ry. Co. v. Walker*, 225 Fed. 648.

What is called the "law of the case" is only a rule of convenience, generally adhered to, of course, but not necessarily.

131 The appellate court by such former decision did not preclude itself from doing justice between the parties, if it should be convinced that its former decision was erroneous. *Messinger v. Anderson*, 225 U. S. 436, 444; 56 L. Ed. 1152, 1156; *Lewers & Cook v. Atcherly*, 222 U. S. 285, 295; 56 L. Ed. 202, 205, 206; *Hertz v. Woodman*, 218 U. S. 205.

There is no occasion however on this appeal to consider whether our former decision was right or wrong, and we dismiss the matter without further notice. The position now taken is that the question before us on this appeal was not considered or decided on the former appeal and is therefore under the decisions cited open for consideration, and decision. We come now to consider the right of counsel for appellee to raise the question as to the effect of the act of 1912, because with knowledge of that act on the part of the Department of Justice the question was not raised on the former appeal. It is claimed that appellee is estopped from raising the question now because it did not raise it on the former appeal, and further that it cannot change its position from that which it took on the former appeal. So far as the question of estoppel is concerned we see no merit in that contention. Whether or not the act of 1912 repealed the act of 1882 was a question of law. It could have been raised without any mention of the matter in the answer filed to the amended complaint. To hold that if counsel does not raise all the questions of law on the first appeal he may not thereafter raise any new questions of law would be a very severe rule. There may have been a change of counsel and many other matters which caused the failure to raise all the applicable questions of law. The question now raised is not inconsistent with but simply an additional reason why the act of 1882 could not be relied upon by appellant as giving him an allotment. The real question is, was the point now raised decided on the former appeal. As we are clearly of the opinion that it was not, we think the point is still open for decision. In view of what we have said the decree below must be affirmed and it is so ordered.

Filed November 21, 1919.

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(Decree.)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1919.

No. 5283.

HIRAM CHASE, JR., Minor, by His Next Friend, HIRAM CHASE,
Appellant,

VS.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the District
of Nebraska.

Friday, November 21, 1919.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

November 21, 1919.

(Petition for Appeal to Supreme Court U. S.)

The above named appellant, Hiram Chase, a minor, by his next friend, Hiram Chase, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a decree and judgment therein was rendered on the 21st day of November, 1919, affirming the decree of the District Court of the United States for the District of Nebraska, Omaha Division, and that the matter in controversy in said suit exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000) Dollars, and that the cause is one in which the said United States Circuit Court of Appeals for the Eighth Circuit has

rendered a final judgment and decree. That this is not a case in which the original jurisdiction of the United States District Court for the District of Nebraska was dependent upon the fact that the parties to the suit or controversy, were citizens of different States, but that the jurisdiction of said Court was involved, and the facts averred in the Bill of Complaint were bottomed upon averment that the case was one arising under Treaties heretofore made between the United States and the Omaha Tribe of Indians, and under statute laws of the Congress of the United States relating to Omaha Indian Reservation, and the allotment of lands to the members of the Omaha Tribe of Indians, including this complainant; to wit: that the suit is one by the appellant, claiming the right to an allotment, as a member of the Omaha Tribe of Indians, of the West Half of the North-west quarter of Section 25, Township 25, Range 9, East of the 6th P. M., in the State of Nebraska. That the United States District Court for the District of Nebraska, Omaha Division, and United States Circuit Court of Appeals for the Eighth Circuit, by their respective judgments and decrees have held by the construction which they have respectively put on an Act of Congress of May 11, 1912, that the lands in Omaha Indian Reservation are no longer subject to allotment, and that by reason whereof, the appellant herein is not entitled to an allotment of the lands by him claimed.

Wherefore, the said appellant prays that an appeal be allowed him in the above entitled cause, directed to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, to send a record of the proceedings in said case, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in this proceeding may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

JOHN LEE WEBSTER,
Solicitor and Attorney for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 14, 1920.

134 *(Assignment of Errors on Appeal to Supreme Court U. S.)*

I. Whereas, the United States Circuit Court of Appeals for the Eighth Circuit, had heretofore decided on a former appeal in the suit of Hiram Chase, Jr., a minor, by his next friend, Hiram Chase, Appellant, v. United States of America, Appellee, 238 Fed. 887, that Hiram Chase, Jr., was born into, and entitled to, an allotment out of the lands of the Omaha Indian Reservation, under the provisions of Section 8 of an Act of Congress, under date of Aug. 7, 1882 (22 Stat. 341); that said United States Circuit Court of Appeals should have adhered to said ruling and judgment on the second appeal in the Chase case, both as a matter of principle and as a matter of law, and that said judgment and decree of said Court in Chase v. United States, 238 Fed. 887, became and was the law of the case, and the parties litigant became and were bound thereby.

II. At the time when the Chase case was first argued and determined in the United States District Court for the District of Nebraska, and at the time when the case was argued and submitted in the United States Circuit Court of Appeals for the Eighth Circuit, the Department of Justice of the United States was then and there fully advised of the Act of May 11, 1912, authorizing the sale of the Omaha Indian Reservation (said arguments, judgments, and decrees being long after the passage of said Act of Congress of May 11, 1912), and that the Department of Justice, in the preparation for the defense to be made by the United States to the claims of the different members of Omaha Tribe of Indians to allotments of lands in the Omaha Indian Reservation under the provision of Section 8 of the Act of Aug. 7, 1882, did have under consideration the said Act of May 11, 1912, as a possible defense thereto, and upon mature consideration decided not to, and did not, make claim that said Act of May 11, 1912, either superseded or repealed the Act of Aug. 7, 1882, and whereas, the United States Circuit Court of Appeals for the Eighth Circuit, upon said appeal, ruled that the said Act of March 3, 1893 (27 Stat. 630), did not repeal the Act of Aug. 7, 1882, all the parties to said proceeding became bound by said judgment and decree of said Court.

III. The United States was at liberty, upon the first trial in the U. S. District Court, and upon the former appeal to the United States Circuit Court of Appeals for the Eighth Circuit, to insist that the Act of May 11, 1912, operated to repeal the Act of 1882; and whereas, said defense was then and there available, but not made, the United States became, was and is estopped by its conduct in the premises, from changing its position, and from insisting, on the second appeal to the United States Circuit Court of Appeals, Eighth Circuit, that the Act of May 11, 1912, repealed the Act of Aug. 7, 1882.

IV. The District Court of the United States for the District of

Nebraska, Omaha Division, was bound by the judgment, decree and mandate from the United States Circuit Court of Appeals for the Eighth Circuit, in *Chase v. United States*, 238 Fed. 887, and said U. S. District Court had no authority, power, or jurisdiction to depart therefrom, or to modify or reverse said judgment, decree and mandate of the United States Circuit Court of Appeals for the Eighth Circuit.

V. United States District Court of the United States for the District of Nebraska, and United States Circuit Court of Appeals for the Eighth Circuit, should have found, adjudged, and decreed, that the Act of May 11, 1912, did not operate to repeal Section 8 of the Act of August 7, 1882, and should have found, adjudged, and decreed, that the appellant herein was born into, and entitled to an allotment of lands out of Omaha Indian Reservation, under Section 8 of the Act of August 7, 1882.

VI. The United States District Court for the District of Nebraska, and the United States Circuit Court of Appeals for the Eighth Circuit, should have found, adjudged and decreed that under the provision of Section 8 of said Act of 1882; that at the expiration of the twenty-five year trust period in said section provided for, 136 which expired July 10, 1909, that the United States thereby and thereunder agreed to, and was bound to convey by patent, to said Omaha Tribe of Indians, in fee, discharged of said trust, and free from all charges and encumbrances whatever, the lands then remaining of said Omaha Indian Reservation; and that the neglect and failure of the proper officers of the United States to execute and deliver said patent, did not operate to defeat the Omaha Tribe of Indians of the legal title, in fee, to the lands of said Omaha Indian Reservation.

The said United States Circuit Court of Appeals for the Eighth Circuit should have adhered to what it said in *Chase v. United States*, 238 Fed. 887-890:

"The trust period of 25 years for such allotment would therefore expire on July 10, 1909. The United States failed to issue the patent to the tribe, as provided in section 8 of the act of 1882; but this is conceded to have been an unimportant omission of a ministerial duty only, and that the rights of the members of the tribe therein are not affected by the omission."

and whereas, said trust period expired and said title vested in said Omaha Tribe of Indians some three years before the passage of the Act of May 11, 1912, that, therefore, the said Act of May 11, 1912, was wholly inoperative and of no effect, and in no way operated to cut off the right of the complainant to a right of allotment as provided for in Section 8 of the Act of August 7, 1882, as first held, adjudged and determined in *Chase v. United States*, 238 Fed. 887.

VII. United States Circuit Court of Appeals should have found and decreed that the complainant herein was and is entitled to an

allotment of the lands claimed by him in his bill of complaint set forth.

JOHN LEE WEBSTER,
Solicitor for Appellant.

137 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 14, 1920.

(Affidavit as to Amount in Controversy.)

STATE OF NEBRASKA,
Douglas County, ss:

James E. Malloy and Leslie S. Strain, being each first duly sworn upon his oath says that he is personally acquainted with, and knows the value of the real estate described in the Bill of Complaint, and in the Amended Bill of Complaint, in the above entitled cause, to-wit: the West Half of the North-west quarter of Section 25, Township 25 Range 9 each of the 6th P. M., in the State of Nebraska, and that the reasonable value of said tract of land is the sum of Eight Thousand (\$8,000) Dollars, exclusive of interest and costs, and that each forty (40) acres contained in said description of land is of the reasonable value of Four Thousand (\$4,000) Dollars, exclusive of interest and costs.

Affiants further state that there are a number of other like cases pending in the District Court of the United States for the District of Nebraska, Omaha Division, aggregating eighty-six (86) in number, and arising out of similar facts and involving the same questions of law which are presented in the petition of the appellant herein, and that the value of the lands involved in all of said suits exceeds the sum of Five hundred thousand (\$500,000) Dollars, exclusive of interest and costs; that in each of said pending suits, stipulations have been signed and approved by the Judge of the District Court, and filed therein, to the effect that each and all of said several suits shall abide by the final judgment and mandates in this pending appeal.

JAMES E. MALLOY,
LESLIE S. STRAIN.

Subscribed in my presence and sworn to before me this 10th day of January, 1920.

138 [SEAL.]

S. DANAHEY,
Notary Public.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 14, 1920.

(Bond on Appeal to Supreme Court U. S.)

Know all Men by these Presents That we, Hiram Chase Jr., a minor, by his next friend, Hiram Chase, as principals, and Walde E. Whitcomb and L. C. Brownrigg as sureties are held and firmly bound unto the United States of America in the sum of Five hun-

dred dollars (\$500.00), to be paid to United States of America, subject to the following conditions:

Whereas, the appellant in the above entitled cause has sued out an appeal to the Supreme Court of the United States to reverse the decree and judgment rendered and entered in the United States Circuit Court of Appeals for the Eighth Circuit on the 21st day of November, 1919.

Now, Therefore, the condition of this obligation is such that, if the said appellant shall prosecute said appeal to effect, and answer all costs, if it fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and effect.

HIRAM CHASE, JR., *A Minor*,

By His Next Friend, HIRAM CHASE,

JOHN LEE WEBSTER,

His Solicitor.

WALDO E. WHITCOMB,

L. C. BROWNRIGG.

Approved Jan. 14th, '20.

JOHN E. CARLAND,

Circuit Judge.

STATE OF NEBRASKA,

County of Douglas, ss:

Waldo E. Whitcomb, and L. C. Brownrigg, being each separately duly sworn, depose and say that they are each owners of real estate within the State of Nebraska and District of Nebraska, of a value exceeding \$20,000 over and above their liabilities, free from encumbrance, and subject to execution.

WALDO E. WHITCOMB.

L. C. BROWNRIGG.

Subscribed in my presence and sworn to before me this 12th day of January, 1920.

S. DANAHEY,

Notary Public.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 14, 1920.

(Order Allowing Appeal to Supreme Court U. S.)

It is hereby ordered that an appeal in the above entitled case, to the Supreme Court of the United States be, and is, hereby allowed as prayed.

Dated this 14th day of January, 1920.

JOHN E. CARLAND,

United States Circuit Judge, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 14, 1920.

140 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 5283.

HIRAM CHASE, JR., a Minor, by His Next Friend, HIRAM CHASE,
Appellant,

VS.

UNITED STATES OF AMERICA, Appellee.

Citation on Appeal.

To United States of America:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, 30 days after the date of this Citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein you are appellee, and Hiram Chase, Jr., a minor, by his next friend, Hiram Chase, is appellant, to show cause, if any there be, why the decree and judgment rendered against the said appellant, as in his said appeal mentioned, shall not be corrected, and why speedy justice shall not be done to the parties in that behalf.

Witness the Honorable John E. Carland, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 14th day of January, 1920.

JOHN E. CARLAND,

United States Circuit Judge, Eighth Circuit.

Service of above Citation is accepted in behalf of United States of America.

T. S. ALLEN,

United States Attorney.

Dated Jan. 27, 1920.

[Endorsed:] No. 5283. United States Circuit Court of Appeals, Eighth Circuit. Hiram Chase, Jr., a Minor, by his next Friend, Hiram Chase, Appellant, vs. United States of America, Appellee. Citation on April to Supreme Court U. S. Filed Jan. 29, 1920. E. E. Koch, clerk.

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Clerk's Certificate.

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska, as prepared and printed under

the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Hiram Chase, Jr., minor, by his next friend, Hiram Chase, was Appellant, and the United States of America was Appellee, No. 5283, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acceptance of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirty-first day of January, A. D. 1920.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,

*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Endorsed on cover: File No. 27,468. U. S. Circuit Court Appeals, 8th Circuit. Term No. 713. Hiram Chase, Jr., a minor, by his next friend, Hiram Chase, appellant, vs. The United States of America. Filed February 7th, 1920. File No. 27,468.

CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 1920.

CHASE, JR., A MINOR, ETC. *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

No. 242. Argued March 21, 22, 1921.—Decided April 11, 1921.

1. The cession made by the Omaha Indians through the treaties of 1854 and 1865, the provision made by the latter for assigning parcels, in the retained reservation, to members of the tribe in severalty, for the exclusive use of themselves, their heirs and descendants, the provisions made by the Act of 1882 (and the Act of 1893) for granting allotments in severalty in trust for 25 years and then in fee, and the further provision of the former act (not carried out) for conveying the unallotted residue of the reservation to the tribe in trust for a like period and then in fee discharged of the trust and of all charge and incumbrance whatsoever,—did not deprive Congress of the power to make other disposition of the unallotted reservation for the benefit of the Indians. P. 6. *United States v. Chase*, 245 U. S. 89; *Sizemore v. Brady*, 235 U. S. 441.
2. The right to obtain an allotment under the acts referred to was not a vested right as respects this power of Congress. P. 7.
3. The Act of May 11, 1912, c. 121, 37 Stat. 111, by which the Secretary of the Interior was "authorized" to sell all the unallotted lands of the Omaha Reservation in parcels, with certain specific exceptions, covers the whole subject of the disposition of those lands and supercedes the earlier provisions, *supra*, for allotting them. P. 8.

4. Even if this act should be construed as permissive rather than mandatory, the Secretary's refusal to allow further allotments because of it is an exercise of his discretion to reserve the land for disposition under it. P. 8.
5. Whether a party defendant, upon reversal of a judgment in his favor, may introduce a new defense which was available on the former trial, is not a question of jurisdiction but of practice. P. 9.
6. *Held*, that the courts below rightly permitted the United States to set up a statutory repeal at the second trial which was ignored at the first. P. 10.

261 Fed. Rep. 833, affirmed.

APPEAL from a decree of the Circuit Court of Appeals, which affirmed a decree of the District Court dismissing the bill in a suit brought by the appellant against the United States for an adjudication of his membership in the Omaha Tribe of Indians with a right to select an allotment out of the lands of the Omaha Reservation. The facts are stated in the opinion.

See also the reports of the case in the court below, 238 Fed. Rep. 887; 261 Fed. Rep. 833; and *Gilpin v. United States*, 261 Fed. Rep. 841, s. c., *post*, 10.

Mr. John Lee Webster, with whom *Mr. Hiram Chase* was on the briefs, for appellant:

The federal court has jurisdiction of suits by persons of Indian blood claiming right to allotment of Indian lands.

The appellant was born into a right to allotment under the Act of 1882, as amended by the Act of 1893. *Chase v. United States*, 238 Fed. Rep. 887, 890.

The United States cannot now shift its ground of defense. Having relied at the first trial, and on the first appeal, upon the single proposition that the Act of 1893 repealed the Act of 1882, and thereby cut off the right to allotment, and having failed in that defense, it cannot, upon the second trial, abandon that defense and insist that the Act of May 11, 1912, repealed the Act of 1882. *Cromwell v. County of Sac*, 94 U. S. 351, 353; *Railway*

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Argument for Appellant.

Co. v. McCarthy, 96 U. S. 258, 267, 268; *Davis v. Wakelee*, 156 U. S. 680, 689, 690; *Werlein v. New Orleans*, 177 U. S. 390; *Southern Cotton Oil Co. v. Shelton*, 220 Fed. Rep. 247, 256; *Smith v. Boston Elevated Ry. Co.*, 184 Fed. Rep. 387, 389; *Oakland Sugar Mill Co. v. Wolf Co.*, 118 Fed. Rep. 239, 248; *Brooks v. Laurent*, 98 Fed. Rep. 647, 655.

This doctrine of estoppel against changing the grounds of defense, or shifting positions, applies to the United States as well as to individuals. *United States v. California & Oregon Land Co.*, 192 U. S. 355; *Northern Pacific Ry. Co. v. Slaght*, 205 U. S. 122.

The Act of May 11, 1912, did not repeal the Act of 1882, or the amendatory Act of 1893. In any event, the Acts of 1882 and 1893, providing for allotments to members of the tribe, remain in full force, and continue to be operative until there shall be an actual sale of the lands. The Act of 1912 does not make reference to the other acts, and contains no repealing clause. The repealing clause in the original draft of the act was stricken out. It contains no words which, by their terms, take away the continuing right of allotment provided for in the other acts.

Repeals by implication are not favored.

The Secretary of the Interior has never taken any steps to sell, nor made any declaration that he intends to sell the lands of the Omaha Reservation, under the Act of 1912. The language of the act is neither directory nor mandatory; it only authorizes the Secretary to sell—a discretionary power.

The title in fee to the reservation, under § 8 of the Act of 1882, became vested in the Indian tribe, and a patent in fee should have been executed by the United States July 10, 1909. The United States has no interest or title in the lands of the reservation which the Secretary could sell or convey under the Act of 1912. The Act of 1912 is therefore of no force or effect. *Chase v. United States*, 238 Fed. Rep. 887, 890.

The fact that the United States neglected to perform a ministerial duty, to-wit, to issue the patent in fee to the tribe, did not reinvest the title in the United States nor give the United States a right to sell the lands.

The proviso in § 8 of the Act of 1882, by which the United States bound itself, at the expiration of the trust period, to convey the reservation by patent to said Omaha Tribe of Indians in fee discharged of said trust and free of all charges or incumbrances whatsoever, was a contractual obligation based upon ample consideration.

Mr. Assistant Attorney General Garnett, with whom *Mr. H. L. Underwood*, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. Oscar C. Anderson, with whom *Mr. Charles J. Kappler* was on the brief, for the Omaha Tribe of Indians, by special leave of court.

MR. JUSTICE McKENNA delivered the opinion of the court.

Suit to adjudge Hiram Chase, Jr., a member of the Omaha Tribe of Indians and to have a right to select eighty acres for an allotment out of the lands of the Omaha Reservation, the selection having been denied by the Secretary of the Interior.

The right of selection depends upon the effect of certain treaties between the Omaha Tribe and the United States and certain acts of Congress.

The treaties were made in 1854 and in 1865, 10 Stat. 1043, 14 Stat. 667, and by them the Indians ceded certain lands to the United States and certain other lands were retained constituting the Reservation with which this suit is concerned and of which the lands sought to be allotted are a part.

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It was expressed in the treaty of 1865 to be the desire of the Indians to abolish the tenure in common by which they held their lands and to acquire tracts in severalty of 160 acres to heads of families and 40 acres to each male person of 18 years and upwards; and it was provided that the whole of the lands so assigned or unassigned should constitute and be known as the Omaha Reservation.

The assignments were to be approved by the Secretary of the Interior, be evidenced by certificates, and be final and conclusive.

In execution of the purposes of the treaty, Congress passed an act in 1882 (22 Stat. 341) by which the Secretary was authorized to allot the portion of the reservation lying east of the Sioux City and Nebraska Railroad in severalty, to each head of a family a quarter section (160 acres); to each single person over 18, one-eighth of a section; to each orphan child under 18, one-eighth of a section; and to each other person under that age, one-sixteenth of a section. The issue of patents was provided for, the lands to be held in trust for 25 years for the sole use and benefit of the respective allottees. And it was provided (§ 8) that the residue of the lands should be patented to the tribe but held in trust for 25 years, and then to be conveyed in fee discharged of the trust. From these lands, however, it was provided that allotments should be made and patented to each Omaha child who might be born prior to the expiration of the 25-year trust period.

Under the act and prior to July 11, 1884, allotments were made to 954 members of the tribe and patents issued therefor. No patent was issued to the tribe as provided.

By the Indian Appropriation Act passed March 3, 1893, c. 209, 27 Stat. 630, and expressing itself to be an amendment to the Act of 1882, the Secretary of the Interior was authorized with consent of the Indian tribe to allot in severalty ". . . to each Indian woman and child of said tribe born since allotments of land were

made in severalty to the members thereof under the provisions of said act [1882], and now living, one-eighth of a section of the residue lands held by that tribe in common, instead of one-sixteenth of a section, as therein provided, and to allot in severalty to each allottee under said act, now living, who received only one-sixteenth of a section thereunder, an additional one-sixteenth of a section of such residue lands. . . ."

Hiram Chase, Jr., was not born until after the Act of 1893 was passed, and the question is, whether he is entitled to an allotment under it? The Government contends to the negative, basing the contention upon an Act passed May 11, 1912, c. 121, 37 Stat. 111, which, it is the further contention, repealed the Act of 1893, and cut off the right of allotment.

The District Court yielded to the contention and dismissed the bill, and its decree was affirmed by the Circuit Court of Appeals. 261 Fed. Rep. 833.

Against this action of the courts appellant asserts error, and insists that it and the contention of the Government are based on an underestimate of his rights and upon a wrong construction of the Act of 1893.

First as to his rights. The contention is that appellant had a vested right to an allotment "under the treaties and acts of Congress as they existed at the time when" the allotment was "selected and claimed" and this whether the Act of 1912 repealed the Act of 1893 or was subordinate to or complementary of its provisions. In support of the contention appellant recites the various provisions of the treaty of 1865 and the Acts of 1882 and 1893 and insists that they are clear and direct investments of irrevocable rights in pursuance of "a contractual obligation based upon ample consideration." In specification the treaty of 1854 is adduced as having "ceded to the United States a portion of the Reservation described in Article I" and "by Article VI, individual Indians were to receive allot-

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ments of lands." This purpose, is the further contention, was executed by the treaty of 1865 by which the Indians "did 'cede, sell, and convey to the United States'" a part of their Reservation, and among other provisions there was one, expressed in Article IV of the treaty, for allotments to be "for the exclusive use and benefit of themselves [the Indians], their heirs, and descendants."

Of the obligations thus incurred, it is the insistence, § 8 of the Act of 1882 was the fulfillment, and at the expiration of the trust period the Reservation (residue) was to be conveyed to the tribe "in fee discharged of said trust and free of all charge or incumbrance whatsoever" and that, therefore, the Act of 1912 which directed the sale of the unallotted lands of the Reservation was in contravention of the treaties and the rights to allotments thereunder and under the Acts of Congress of 1882 and 1893, *supra*.

The contention is one that has often been made in this court and rejected as often as made. *Gritts v. Fisher*, 224 U. S. 640; *Choate v. Trapp*, 224 U. S. 665; *Cherokee Nation v. Hitchcock*, 187 U. S. 294. In those cases the relation of the individual Indian to the tribal property is explained and also the power of Congress over that property and the tribes. In the recent case of *United States v. Chase*, 245 U. S. 89, we had occasion to consider the Reservation here involved and the effect of Article IV of the treaty of 1865 relied on by the appellant, and decided that its purpose was to do no "more than to individualize the existing tribal right of occupancy" and that it left "the fee in the United States" and left "the United States and the tribe free to take such measures for the ultimate and permanent disposal of the lands, including the fee, as might become essential or appropriate in view of changing conditions, the welfare of the Indians and the public interests."

The case dealt with assignments under Article IV, but

its principle necessarily applies to a mere right under the Act of 1882. *Lone Wolf v. Hitchcock*, 187 U. S. 557; *Size-more v. Brady*, 235 U. S. 441; *Cherokee Intermarriage Cases*, 203 U. S. 76; *Wallace v. Adams*, 204 U. S. 415; *Stephens v. Cherokee Nation*, 174 U. S. 445.

The next contention of appellant is that he acquired a vested right under the Acts of 1882 and 1893 assuming the latter act did not repeal the other, and we are brought to the Act of 1912. By that act the Secretary is "authorized to cause to be surveyed, if necessary, and appraised, in such manner as he may direct, in tracts of forty acres each, or as nearly as to the Secretary may seem practicable, and, after such survey and appraisement, to sell and convey, in quantities not to exceed one hundred and sixty acres to any one purchaser, all the unallotted lands on the Omaha Indian Reservation, in the State of Nebraska, except such tracts as are hereinafter specifically reserved: *Provided*, That the said land shall be sold to the highest bidder under such regulations as the Secretary of the Interior may prescribe, but no part of said land shall be sold at less than the appraised value thereof. . . ." There is provision for the reservation from sale of certain tracts with which this case is not otherwise concerned except as it shows complete delegation of administration to the Secretary. Appellant's contention is that the act is neither directory nor mandatory; it is permissive only and has been, it is said, so construed by the Secretary. There are cases, however, that decide that an officer "authorized" is an officer commanded in a matter of public concern.¹ Besides, there are words of direction in the act and they are necessary to its purposes. But, if it

¹ *Anne Arundel County Commissioners v. Duckett*, 20 Md. 468; *Flynn v. Canton Co.*, 40 Md. 312, 319; *Magaha v. Hagerstown*, 95 Md. 62; *Rankin v. Buckman*, 9 Or. 253, 262; *Supervisors v. United States*, 4 Wall. 435; *Maryland v. Miller*, 194 Fed. Rep. 775; *United States v. Cornell Steamboat Co.*, 137 Fed. Rep. 455.

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may be assumed there is a discretion in the Secretary, he has exercised it against the appellant by denying his right to an allotment, presumably in reservation of the land for sale as provided in the act. And a sale is provided for—a sale of the unallotted lands mentioned in § 8 of the Act of 1882, and all of them. We agree, therefore, with the Circuit Court of Appeals that the Act of 1912 “covers so completely the subject of the disposition” of those lands “that it must be held to have repealed that portion of the Act of 1882 which authorized allotments to Omaha children during the trust period.” And, again quoting the Court of Appeals, “the Secretary of the Interior, of course, could not allot the unallotted lands under the Act of 1882, and also sell them under the Act of 1912; nor could he allot the unallotted lands and at the same time make the reservations which he is commanded to make by section 2 of the latter act. It is so plain that both acts cannot be carried out that it is unnecessary to discuss that question.” It supersedes, therefore, that act though it contains no repealing words. *United States v. Tynen*, 11 Wall. 88; *King v. Cornell*, 106 U. S. 395; *The Paquete Habana*, 175 U. S. 677, 685.

This appeal is a review of the second trial of the case. In the first trial the District Court on motion of the United States dismissed the bill. Upon appeal the Circuit Court of Appeals reversed the District Court and remanded the case to that court “with instructions to permit the defendant [United States] to answer, if so advised.” 238 Fed. Rep. 887.

Upon the return of the case the United States set up as a defense the Act of 1912 presenting the questions here involved.

Appellant contends that the United States “having relied at the first trial upon the single proposition that the Act of 1893 repealed the Act of 1882, and thereby cut off the right of these Indian claimants to allotments, and

having failed in that defense, cannot, upon the second trial, abandon that defense and insist that the Act of May 11, 1912, repealed the Act of 1882."

The proposition has a relevant and conclusive application when a judgment of a former action is pleaded but limited application when urged in the same suit, it expresses a practice only and useful as such, but not a limitation of power. *Messenger v. Anderson*, 225 U. S. 436.

The District Court and the Circuit Court of Appeals, having the power and exercising it, entertained the defense of the Act of 1912, estimated it and decided it conclusive against appellant's right to an allotment. As we have seen there was no error in that ruling, and the decree of the Circuit Court of Appeals is

Affirmed.
